142-488

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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1888.**

No. ~~1111~~. 784 ~~466~~ 125

E. C. EAMES, DEXTER N. FORCE, H. I. FAIRCHILD DANIEL ROBINSON, WILLIAM S. DUNN, AND JOHN CLAFLIN, SURVIVING PARTNERS OF THE FIRM OF H. B. CLAFLIN & CO., PLAINTIFFS IN ERROR,

*vs.*

SAMUEL KAISER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

**FILED SEPTEMBER 27, 1888.**

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1888.

No. 1114.

E. C. EAMES, DEXTER N. FORCE, H. I. FAIRCHILD, DANIEL ROBINSON, WILLIAM S. DUNN, AND JOHN CLAFLIN, SURVIVING PARTNERS OF THE FIRM OF H. B. CLAFLIN & CO., PLAINTIFFS IN ERROR,

*vs.*

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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1 January Term, 1888.

MONDAY, *January* 30, 1888.

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court for the northern district of Texas, at the city of Dallas, in Dallas county and said district, on the 30th day of January, A. D. 1888, it being the second Monday in said month in said year, and being the day fixed by law for commencing a regular term of said court at said place—present and presiding, the Honorable Andrew P. McCormick, United States district judge for the northern district of Texas; Chas. B. Pearre, United States attorney for said district; W. L. Cabell, United States marshal for said district, and A. J. Houston, clerk of said court—when and where the following proceedings were had, to wit:

2 THE STATE OF TEXAS, *County of Tarrant:*

In District Court. September Term, 1883.

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. *et al.* } No. 2667.

To the honorable district court of said county:

Your petitioner, hereinafter styled plaintiff, who resides in said last-named county and State, complaining of H. B. Claflin
3 & Co., a firm composed of H. B. Claflin, E. C. Eames, H. I. Fairchild, Dexter N. Force, Daniel Robinson, William S. Dunn, and John Claflin, all of whom reside in the city and State of New York, and of L. Levenson & Co., another firm composed of L. Levenson, Michael Levenson, and Max Levenson, who also reside in said city and State of New York, hereinafter styled defendants, would respectfully represent and show unto your honorable court—

That heretofore, to wit, on the 16th day of November, 1882, and for, to wit, five years prior thereto, plaintiff was and has been engaged in the business of a wholesale and retail dealer in dry goods, clothing, boots and shoes, and other merchandise of like character, in the city of Fort Worth, Tarrant county, Texas; and for a long time prior thereto, to wit, twenty years prior thereto, he had been engaged in said business in various other places in the United States.

That by his honesty, industry, fair dealing, and promptness in paying his debts during said period of years the plaintiff had acquired and established for himself a good reputation and credit among commercial men and wholesale dealers throughout the principal cities in the United States, insomuch that he was thereby enabled to purchase large quantities of goods on credit at the said principal cities up to the said date, and had thereby established, built up, and carried on his said business of dealer in dry goods, &c., in such manner and to such an extent that the same had be-

4 come and was, at the date aforesaid, profitable to him, and he had been able to support himself, his wife, and a large family of children, and to send his said children to school during said number of years, and had, in addition thereto, and in despite of unavoidable accidents and financial crisis at said date, accumulated, over and above all his debts and liabilities, the sum of, to wit, twenty-five thousand dollars, which said money was invested in and constituted a part of the stock of merchandise hereinafter referred to and described.

That on the date aforesaid plaintiff was the owner and in possession of a stock of dry goods, clothing, boots, shoes, notions, &c., of the value of, to wit, thirty thousand dollars ($30,000.00), which said stock of merchandise constituted his stock in trade, and with which he was at said city of Fort Worth then and there carrying on and engaged in said business of wholesale and retail dealer in dry goods, &c., as aforesaid.

That plaintiff had, by means of his qualifications, honesty, and honest exertions, as hereinbefore related, on said date succeeded in establishing a lucrative business and trade at said place of Fort Worth, and had possessed and enjoyed the confidence and good will of all commercial men and wholesale dealers generally throughout the country, insomuch that there was a just and reasonable prospect of his said business still further increasing and of his being able thereby to make correspondingly larger profits.

5 That his said credit and standing as a merchant was of great value to him in enabling him to purchase goods for lower prices and on longer time and to borrow money, and, in truth and in fine, was indespensable to the proper conduct and carrying on of his said business, and besides greatly conduced to his pleasure and peace and happiness as a man and a citizen.

That on the said 16th day of November, 1882, the plaintiff owed and was indebted to the defendants, H. B. Claflin & Co., in the sum of six thousand four hundred and twenty-nine & $\frac{35}{100}$ dollars ($6,429.35), but that no part of the same was then due, and that he, the said plaintiff, then and there owed and was indebted to the defendant, L. Levinson & Co., in the sum of thirteen hundred and fifty-three & $\frac{34}{100}$ dollars ($1,353.34), but that no part of said debt was then due.

That on said last-named day the said defendants, acting together, and through and by means of their mutual agent and attorney, one L. F. Smith, filed their certain original petitions in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, numbered and entitled, respectively, as follows: "No. 337, H. B. Claflin & Co. *vs.* Samuel Kaiser," and "No. 338, L. Levinson & Co. *vs.* Samuel Kaiser." Whereby they instituted suits on their said debts against this plaintiff in the said court (but, as plaintiff will hereafter show, the said defendants each sued for and claimed more than was justly owing to them from plaintiff), and then and there, through and by their said attorney and agent, L. F. Smith, simultaneously with the bringing of their said actions and the filing of their said original petitions, swore to and filed in

6 their said respective actions their certain affidavits for the purpose of obtaining and causing writs of original attachment to issue against the property of this plaintiff, in which said affidavit, in case No. 337, the said Smith, for and on behalf of the said defendant, H. B. Claflin & Co., alleged and swore that this plaintiff was justly indebted to the said H. B. Claflin & Co. in the sum of seven thousand two hundred and eight & $\frac{8}{100}$ dollars, and further that this plaintiff (defendant in said action) was about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors, and that the attachment therein was not sued out for the purpose of injuring or harassing defendant, and that the plaintiffs would probably lose their debt unless such attachment was issued; and in which said affidavit, in case No. 338, he, the said Smith, for and on behalf of the said defendant, L. Levenson & Co., alleged and swore that this plaintiff was justly indebted to the said L. Levenson & Co. in the sum of fifteen hundred and three & $\frac{34}{100}$ dollars, and, in like manner as in said other affidavit, also alleged and swore was about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors, and that said attachment was not sued out for the purpose of injuring or harassing this plaintiff, and that the said L. Levenson & Co. would probably lose their said debt unless such attachment was issued; and thereupon in each of said cases filed with said clerk bonds, as was required by the statutes in such cases made and provided; where-

7 upon there was issued by said clerk of said court, at the special instance and request of said defendants, acting through their agent, L. F. Smith, as aforesaid, two writs of original attachment against this plaintiff, said writs being directed to the marshall of the said northern district of Texas, wherein and whereby in said writ issued in said cause, No. 337, he, the said marshall, was commanded to attach so much of the property of this plaintiff as would be of value sufficient to make the said sum of seven thousand two hundred and eight & $\frac{8}{100}$ dollars, and the probable costs of said suit; and wherein and whereby in said cause, No. 338, he, the said marshall, was commanded to attach so much of the property of this plaintiff as would be of value sufficient to make the said sum of fifteen hundred and three & $\frac{34}{100}$ dollars, and the probable costs of said suit; which said writs *was* then and there placed in the hands of James A. McKee, marshall in and for said district, by the said defendants, with instructions to the said marshall to levy the said writs upon the property of this plaintiff, and the said Smith, as agent of defendants as aforesaid, acting together with one Jack Switzer, another agent of the defendant, *of* H. B. Claflin & Co., and with the said M. Levenson, one of the members of the firm of L. Levenson & Co., then and there specially pointed out and designated to the said marshall and his deputies the plaintiff's said stock of dry goods, boots and shoes, clothing, &c., situated in said city of Fort Worth,

8 hereinbefore referred to, and directed the said marshall and his said deputies to seize and take possession of the same under and by virtue of said writs of attachment. Whereupon the

said marshall then and there, acting under the said orders and directions of said defendants, on the 17th day of November, 1882, levied upon and seized the whole of the plaintiff's said stock of dry goods, clothing, boots, shoes, &c., together with all the furniture and fixtures in plaintiff's store-house, under and by virtue of the said writs of attachment in the said actions of defendants, and then and there forcibly dispossessed this plaintiff of the whole of his said property and furniture and fixtures and subjected the same to the said demands and attachments of defendants. Plaintiff says he is unable to give an exact itemized statement of each and every article of property so levied upon and seized by the said marshall at said time, under the said writs, but that a description and itemized statement of the greater portion of said property is made and included in the invoice, marked Exhibit "A," attached to and made a part of the said marshall's return on the said writ of attachment in said cause No. 337, entitled H. B. Claflin & Co. *vs.* Samuel Kaiser, to which said invoice reference is here made. Plaintiff, however, here avers that the property described in said invoice and levy was then and there of much greater value than the same is represented to be by said marshall's invoice, for that whereas said property is valued by the said marshall in his said invoice and returned at the sum of $19,801.21,
9 the same was then and there worth at least the sum of thirty thousand dollars as aforesaid; and plaintiff further here avers that there was included in defendant's said stock divers and sundry silk, satin, and cashmere dress goods and divers other articles of merchandise (a more particular description of which it is now impossible for plaintiff to give) of the value of, to wit, five thousand dollars, which were seized and taken under said writs as aforesaid by said marshall, but which are not itemized and set down in said invoice or levy on said writs.

That said marshall, then and there acting under the orders and directions of and in conjunction with the said defendants and their said agents, at the time of levying upon and seizing the plaintiff's said stock of goods, also forcibly took possession of and closed up his store-house and ousted and ejected him from his said store-house and place of business and entered therein for and on behalf of said defendants and remained there for the term and space of, to wit, four months without plaintiff's consent. Plaintiff says that the said attachments, issued against plaintiff and levied on his property as aforesaid, were both and each of them wrongfully sued out by the said defendants and their said agent and attorney, and were also sued out maliciously and without any just, reasonable, or probable cause; and plaintiff avers that the statements and allegations in both and each of the said affidavits for attachment were and
10 are untrue and were known to be untrue by the said defendants and their said agent at the time said attachments were sued out and said affidavits were made, for plaintiff avers that he, plaintiff at the time, said attachment was sued out and levied in said cause No. 337, was not justly indebted to the said H. B. Claflin & Co. in the said sum of $7,208.08, as alleged in the affidavit for attachment therein made, but was only indebted to the said defend-

ant- in the sum of, to wit, $6,429.35 as aforesaid, no part of which was due as aforesaid; and that at the time the said attachment was sued out and levied in said cause No. 338 he, plaintiff, was not justly indebted to the said defendant-, L. Levenson & Co. in the said sum of $1,503.34, as alleged in the affidavit for attachment therein made, but was only indebted to the said defendant- in the sum of, to wit, $1,353.34 as aforesaid; and plaintiff further avers that he, plaintiff, was not, at the date of the making of said affidavits or either of them or at any other time, about to convert his property or any part thereof into money for the purpose of placing it beyond the reach of his creditors or any of them (as was averred in said affidavits), nor was there any reasonable probability that the said defendants or either of them would (as they averred in their said respective affidavits) lose their said debts or either of them unless such attachments were issued; and that said defendants and their said agents and attorneys, well knowing the premises and conspiring together for the purpose of injuring, oppressing, and harassing this plaintiff, wrongfully and maliciously sued
11 out said writs of attachment as aforesaid and caused the same to be levied on the plaintiff's said stock of goods as aforesaid of the value aforesaid, and caused the said marshall to deprive plaintiff of the whole of his stock in trade as aforesaid, and to eject him from his store-house and place of business; and plaintiff avers that by reason of the said levy and seizure of his said stock of goods he was deprived not only of the value of the same, but, in addition thereto, has been deprived of his natural and legitimate profits which he could have and would have made thereon to the amount of, to wit, six thousand dollars; and that by the reason of the said levy and seizure of his said stock and the wrongful and malicious acts of the said defendants and their said agents and attorneys in the premises mentioned the said plaintiff's reputation and credit has been injured and destroyed and the plaintiff has been brought into public scandal, infamy, and disgrace in the commercial world, and is suspected and believed to have been guilty of the fraudulent conduct imputed to him in the said affidavits and to have acted dishonestly in the way of his said business, and has been greatly vexed, harassed, oppressed, and impoverished thereby, and besides divers of said wholesale merchants and manufacturers, to whom all the premises are unknown, by reason of the said suing out of said attachments and making of said affidavits, do now suspect and believe the plaintiff to be dishonest and unworthy of credit,
12 and have since that time and still do refuse to trade or deal with plaintiff and to sell him any goods, insomuch that the plaintiff's said business, as well as his reputation and credit, is broken up and destroyed, and he has not since that time been able to resume or longer carry on his said business of merchant or any other business.

Plaintiff avers that since the filing of said affidavits and the issuance and levy of said writs of attachment the said defendants have both adopted and ratified all the aforesaid wrongful and malicious acts of their said agents and attorneys, and in furtherance of their said

malicious designs and acts the said defendants did make application to said circuit court in said causes to have the defendant's said stock of goods sold, and in pursuance to said application an order of sale was entered whereby the plaintiff's said stock of goods were ordered to be sold by said marshall to the highest bidder in vacation, and in pursuance thereof the said goods were on, to wit, the 15th day of January, 1883, by said marshall, in said city of Fort Worth, sold at public outcry, in one bulk and at one bidding, at the price of, to wit, eleven thousand dollars, when in truth and in fact they were worth, to wit, thirty thousand dollars, as aforesaid.

Plaintiff avers that he has sustained actual damage by reason of the said wrongful and malicious acts of said defendants and their said agents and attorneys, as *as* hereinbefore set forth, in the sum of fifty thousand dollars, and that he ought to recover the further sum of fifty thousand dollars by way of exemplary damages from
13 said defendants on account of their aforesaid malicious conduct of their said agents, which has been ratified and adopted by them as aforesaid.

Wherefore plaintiff prays that defendants be cited to answer this petition, and that he have judgment against said defendants for the said sum of one hundred thousand dollars damages, and for costs.

W. B. & G. G. WRIGHT AND
BALL & McCART,
*Plaintiff's Attorneys.*

Filed June 22, 1883.

J. M. HARTSFIELD,
*Cl'k Dist Court.*

*Citation. Issued July* 11, 1883.

District Court, Tarrant County, Texas. Sept. Term, 1883.

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. *et al.* } No. 2667.

The State of Texas to H. B. Claflin & Co., a firm composed of H. B. Claflin, E. C. Eames, H. I. Fairchild, Dexter N. Force, Daniel Robinson, William S. Dunn, and John Claflin and L. Levenson & Co., a firm composed of L. Levenson, Michael Levenson, and Max Levenson:

You are required to appear before the district court of Tarrant county to be held at the court-house, in the city of Fort Worth, on the sixth Monday after the first Monday in August, A. D. 1883, the same being the 17th day of September, A. D. 1883, then and there to answer the petition of Samuel Kaiser, filed in said court on the 22nd day of June, A. D. 1883, against the said H. B. Claflin & Co. and L. Levinson & Co. for suit, said suit being numbered 2667, the nature of which demand is as follows, to wit:

14 That on the 16th day of November, 1882, plaintiff was and had been engaged in the wholesale and retail dry goods trade in the city of Fort Worth, Tarrant county, Texas, for five years, and for twenty years before that time in other towns and cities, &c., and that on said last-named day defendants, by their agent and attorney, L. F. Smith, filed suit in the circuit court of the United States for the northern district of Texas, at Dallas, against plaintiff, in each of said cases claiming and making affidavit that plaintiff was indebted to H. B. Claflin & Co. in the sum of $7,208.08 and to L. Levenson & Co. in the sum of $1,503.34, and that plaintiff was about to convert his property into money for the purpose of placing it beyond the reach of his creditors; that an attachment was issued in each of said cases, and on November 17th, 1882, was, by the marshall of said court, levied upon the goods, wares, and merchandise of plaintiff, and on January 15, 1883, said goods were sold at public outcry by said U. S. marshall for $11,000.00, which was worth $30,000.00, whereby plaintiff has been broken up in business and greatly distressed in mind, &c., and damaged thereby in the sum of $50,000.00 actual and the sum of $50,000.00 exemplary damages.

Wherefore plaintiff prays judgment for said damages, costs of suit, &c.; a certified copy of which petition accompanies this notice.

Witness J. M. Hartsfield, clerk of the district court of Tarrant county.

Given under my hand and seal of office, at Fort Worth, this the 11th day of July, A. D. 1883.

[L. S.] J. M. HARTSFIELD,
*Clerk District Court, Tarrant County, Texas.*

Issued July 11th, 1883.

J. M. HARTSFIELD, *Clerk.*

15 *Return of Person Serving Notice.*

Came to hand this the 17th day of July, 1883, at 2 o'clock p. m., and executed the 18th day of July, 1883, by delivering to John Claflin, one — the within-named members of the firm of H. B. Claflin & Co., and to Michael Levenson, one of the within-named members of the firm of L. Levenson & Co., the within-named defendants, each in person, a true copy of this notice, together with the certified copy of plaintiff's petition accompanying the same.

LEONARD B. SUTRO.

STATE OF NEW YORK, *City and County of New York:*

Personally appeared before me, on this the 18th day of July, 1883, Leonard B. Sutro, whose genuine signature appears to the above return and who is known to me to be a disinterested person and competent to make oath to the facts set forth in said return, and signed the said return and made oath that the facts set forth in said above return are true.

In witness whereof I hereunto set my hand and affix my notarial seal the date above.

[L. S.] WILLIAM. P. PARKER,
*Notary Public* (2), *New York County.*

Returned and filed July 23, 1883.

J. M. HARTSFIELD,
*Cl'k Dist. Court.*

Recorded August 10th, 1883.

J. M. HARTSFIELD,
*District Clerk.*

16 *Plea to the Jurisdiction.*

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. *et al.* } No. 2667.

Suit pending in the dist. court of Tarrant Co., Texas.

Now comes H. B. Claflin, E. C. Eames, H. J. Fairchild, Dexter N. Force, Daniel Robinson, W. S. Dunn, and John Claflin, composing the firm of H. B. Claflin & Co., and L. Levenson, Michael Levenson, and Max Levenson, composing the firm of L. Levenson & Co., and say that they are the defendants in the above-entitled cause, and that each of the said defendants are now and were at the date of the institution of this suit resident citizens of the city and State of
17 New York and were at the date of the institution of this suit and are now non-residents of the State of Texas. Defendants say that neither one of them were within the State of Texas at the date of the institution of this suit, and that neither one of them have been in the State of Texas since the institution of this suit; wherefore the defendants say that this court has no jurisdiction over their persons, and file this their plea to the jurisdiction of this honorable court, and say that it should not take further cognizance of this cause, and pray that they be discharged with their costs.

CARTER & WYNNE &
CRAWFORDS & SMITH,
*Attorneys for Defendants.*

Now comes M. L. Crawford, one of the attorneys for the defendants in this cause, who, being duly sworn, says that the matters set forth in the foregoing plea are true.

M. L. CRAWFORD.

Subscribed and sworn to before me this September 20, 1883.

J. M. HARTSFIELD,
*District Clerk.*

And should said plea to the jurisdiction be overruled, defendants move the court to quash and set aside the pretended service of citation and process in this cause, for the following reasons:

1. Said citation was not issued to any officer of the State of Texas authorized to serve or execute the same.
2. Said pretended service was not made within the State of Texas.
3. Said pretended service was made upon said defendants when they and each of them were in the State of New York.
18 4. For other reasons apparent.

CARTER & WYNNE AND
CRAWFORDS & SMITH,
*Attorneys for Defendants.*

Filed September 20, 1883.

J. M. HARTSFIELD,
*District Clerk.*

*Original Answer. Filed Sept. the* 20, 1883.

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. *et al.* } No. 2667.

Suit pending in the district court of Tarrant county, Texas.

And should defendants' plea to the jurisdiction of the court and motion to quash service be overruled, then defendants, reserving all legal exceptions to the ruling of the court thereon, answer in said cause as follows:

1. They say the petition of plaintiff is not sufficient in law for him to have and maintain his said cause of action, and of this they pray the judgment of the court.

CARTER & WYNNE AND
CRAWFORDS & SMITH,
*Attorneys for Defendants.*

2. And, specially excepting to plaintiff's said petition, defendants say the same is not sufficient in law for the following reasons, to wit:

1st. Because plaintiff seeks to make defendants responsible for the acts of the United States marshal*l* for the northern judicial district of the State of Texas, and fails to show in what manner defendants are or became liable for the acts of said marshal*l*, or that said U. S. marshal*l* was guilty of any trespass, and that by reason thereof defendants became liable for his unlawful acts.

19 2nd. Because the damages claimed for supposed profits lost by reason of the seizure of the goods as alleged are to- remote and are not the subject of damages in such cases.

3rd. Because plaintiff's petition fails to show in what manner his reputation and standing as a merchant was damaged by reason of the acts complained of, and in what towns or cities and markets his credit was injured, and fails to show what his standing as a merchant was before said acts complained of were committed, or that he had any credit whatever at the time such acts were done.

4th. Because said petition is so vague and indefinite that defendants are not apprised of what character of proof will be introduced

on the trial, or to what extent and for what acts and things plaintiff seeks a recovery against them.

5th. Because said petition fails to charge or set forth specifically and with certainty such acts as constitute a cause of action against the defendants, or either of them. Wherefore they pray the judgment of the court as to the legal sufficiency of said petition.

CARTER & WYNNE AND
CRAWFORDS & SMITH,
*Attorneys for Defendants.*

And, further answering in said cause, the defendants deny each and all the allegations contained in plaintiff's petition, and of this they put themselves upon the country.

CARTER & WYNNE AND
CRAWFORDS & SMITH,
*Attorneys for Defendants.*

Filed September 20, 1883.

J. M. HARTSFIELD,
*District Clerk.*

20 & 21 *Petition for Removal of Cause to U. S. Court. Filed* — 20, 1883.

In the District Court of Tarrant County, State of Texas.

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. *et al.* } No. 2667.

To the honorable court:

Your petitioners, H. B. Claflin, E. C. Eames, H. I. Fairchild, Dexter N. Force, Daniel Robinson, William S. Dunn, and John Claflin, composing the firm of H. B. Claflin & Co., all of whom are now, and were at the institution of this suit, resident citizens of the city and State of New York, and L. Levenson, Michael Levenson, and Max Levenson, composing the firm of L. Levenson & Co., all of whom are now, and were at the institution of this suit, resident citizens of the city and State of New York, would represent and show to the court that they are the defendants in the above-entitled cause; that the plaintiff in said cause, Samuel Kaiser, is now, and was at the time said suit was instituted, a resident citizen of Tarrant county, State of Texas, with- the northern judicial district of the State of Texas; that the amount in controversy in this cause of action exceeds the sum of five hundred dollars, exclusive of costs; that all of the above-named defendants join in this petition; that said cause is now pending in the district court of Tarrant county, and this is the first term of court at which said cause could be first tried; that the issue or controversy in said cause is one wholly between citizens of different States; that your petitioners desire to remove said cause to
22 the circuit court of the United States for the northern district of Texas, at Dallas; that your petitioners file herewith a good

and sufficient bond, as required by act of Congress providing for the removal of causes from the State courts to the courts of the United States; wherefore your petitioners pray that said bond may be accepted, and that said suit may be removed into the next circuit court of the United States in and for the northern district of Texas, holding sessions at Dallas, pursuant to an act of Congress in such cases provided, and that no further proceedings may be had therein in this court, except to make an order of removal as required by law; and your petitioners will ever pray, &c.

CARTER & WYNNE AND
CRAWFORDS & SMITH,
*Attorneys for Petitioners.*

Filed September 20, 1883.

J. M. HARTSFIELD,
*District Clerk.*

*Bond for Removal. Filed Sept. the* 20, 1883.

In the District Court of Tarrant County, Texas.

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. *et al.* } No. 2667.

Know all men by these presents that we, H. B. Claflin, E. C. Eames, H. I. Fairchild, Dexter N. Force, Daniel Robinson, William S. Dunn, and John Claflin, composing the firm of H. B. Claflin & Co., and L. Levenson, Michael Levenson, and Max Levenson, composing the firm of L. Levenson & Company, as principals, and —— —— and —— ——, as sureties, are held and firmly bound unto
23 Samuel Kaiser in the penal sum of five hundred dollars, the payment whereof, well and truly to be made unto the said Samuel Kaiser, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: The said H. B. Claflin, E. C. Eames, H. I. Fairchild, Dexter N. Force, Daniel Robinson, William S. Dunn, and John Fairchild, composing the firm of H. B. Claflin & Company, and L. Levenson, Michael Levenson, and Max Levenson, composing the firm of L. Levenson & Co., having petitioned the honorable district court of Tarrant county, Texas, for the removal of a certain cause therein pending, wherein Samuel Kaiser is plaintiff and H. B. Claflin & Co. *et al.* are defendants, to the circuit court of the United States in and for the northern district of Texas, holding sessions at Dallas: Now, if the said H. B. Claflin *et al.*, your petitioners, shall enter in the said circuit court of the United States on the first day of its next session at Dallas, Texas, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands this 20th day of September, 1883.

H. B. CLAFLIN & COMPANY.
H. B. CLAFLIN.
E. C. EAMES.
H. I. FAIRCHILD.
DEXTER N. FORCE.
24 DANIEL ROBINSON.
WILLIAM S. DUNN.
JOHN CLAFLIN.
L. LEVENSON & COMPANY.
L. LEVENSON.
MICHAEL LEVENSON.
MAX LEVENSON.
By CRAWFORDS & SMITH,
*Attorneys.*
HENRY LEHULD.
ALEX. SANGER.
B. C. EVANS.

The within bond approved this September 20, 1883.

J. M. HARTSFIELD,
*Dist. Clerk, T. Co., T.*

Filed September 20, 1883.

J. M. HARTSFIELD,
*District Clerk.*

*Motion to Remove, &c. Filed Sept. the 20th*, 1883.

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. *et al.* } No. 2667.

Suit pending in the district court of Tarrant county, Texas.

Now come the defendants in the above-entitled cause and represent to the court that they have filed their petition and bond for the removal of this cause to the circuit court of the United States for the northern district of Texas, at Dallas; that said petition is in legal form and said bond conditioned as required by law, with good and sufficient surities; wherefore they pray that your honor grant an order of removal, &c.

CARTER & WYNNE AND
CRAWFORDS & SMITH,
*Attorneys for Motion.*

Filed September 20, 1883.

J. M. HARTSFIELD,
*District Clerk.*

25 *Order Removing Cause, &c.*

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. *et al.* } No. 2667.

Order to remove cause to F. C.

FRIDAY, *Sept.* 21, 1883.

No- comes on to be heard the motion of the defendants herein to remove this cause to the United States court in and for the northern district of Texas; and it appearing to the court that the defendants have complied with the law in such cases made and provided, and it being the opinion of the court, after hearing said motion, that the law is for said motion, it is therefore considered and ordered by the court that said motion be, and the same is hereby, sustained, and that this cause be removed to the United States court for the northern district of Texas, and the clerk of this court is hereby ordered to make out a complete and true copy of the papers filed, orders entered of record, &c., and forward the same to the clerk of said United States court, and the parties here consent that the transcript in said cause shall be transmitted to Dallas, instead of Waco: Provided, however, That such consent shall in nowise operate as a waiver of plaintiff's rights to make a motion to remand said case; it is therefore ordered that the clerk of this court make and deliver to the defendants or their attorneys a transcript, as required by law, of all the process, pleadings, orders, and proceedings had in this cause, to be filed by defendants in the United States court for the northern district of Texas, at Dallas, Texas.

26 H. B. CLAFLIN & Co.
*vs.*
SAMUEL KAISER. } No. 337.

Suit pending in the circuit court of the United States, northern district of Texas, at Dallas.

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. } No. 501.

Suit pending in the circuit court of the United States, northern district of Texas, at Dallas.

Now come H. B. Claflin & Co., plaintiffs in the first-mentioned above-entitled cause and defendants in the last-mentioned cause No. 501, and represent to the court that in said cause No. 337 the defendant, Samuel Kaiser, has filed plea in reconvention for damages against plaintiffs for alleged damages caused by plaintiffs in

suing out and levying a writ of attachment on the goods, wares, and merchandise of said Kaiser, a full description of which said goods is set forth in a certain order of sale issued by this court in said cause No. 337, to which reference is made as a part of this motion; that in cause No. 501 the said Kaiser sues H. B. Claflin & Co., along with other defendants named in his said petition in cause No. 501, to which reference is made as a part of this motion for alleged damages caused by lev-ing the same writ of attachment mentioned in his said plea in reconvention in said cause No. 337; that the said Kaiser's plea in reconvention in cause No. 337 and his said damage suit in cause No. 501 arose out of one and the same transaction and involve the same subject-matter and none other, and that the same relief is sought in both of same causes; wherefore the said H. B. Claflin & Co. move the court to require the said Kaiser to
27 elect which one of said causes of action he relies upon and intends to prosecute against them, to the end that a multiplicity of suits and additional costs may be avoided.

A. M. CARTER & L. F. SMITH,
*For Motion.*

(Endorsed:) No. 337. H. B. Claflin & Co. *vs.* Samuel Kaiser. No. 501. Samuel Kaiser *vs.* H. B. Claflin & Co. *et al.* Filed Dec'r 29, 1883. A. J. Houston, clerk. M. D. 106. A. M. Carter & L. F. Smith, for motion.

[In pencil:] #10, order on above motion, Vol. #2, page #353.
#11, " making election " #2, " #361.

28 *Order.*

From the Minutes, December Term, 1883.

H. B. CLAFLIN AND COMPANY
*vs.*
SAMUEL KAISER. } No. 337.

WEDNESDAY, *January* 9, 1884.

This day came the parties, by their attorneys; then came on to be heard the plaintiffs' motion for an order requiring the defendant herein to elect between this cause and No. 501, on this docket, styled Samuel Kaiser *vs.* H. B. Claflin and Company, and, the argument of counsel thereon being heard and fully understood, it is the opinion of the court that the law is for the plaintiffs herein. It is therefore ordered by the court that the said motion be, and the same is hereby, granted, and the defendant herein is required to comply with this order by 10 o'clock a. m. to-morrow.

*Order.*

From the Minutes, December Term, 1883.

H. B. CLAFLIN AND COMPANY
*vs.*
SAMUEL KAISER. } No. 337.

FRIDAY, *January* 11, 1888.

This day came the defendant, by his attorneys, and in compliance with the order made and entered in this cause on January 9, 1888[4], requiring him to elect between his plea in reconvention herein and the prosecution of cause No. 501, on the docket of this court and styled Samuel Kaiser *vs.* H. B. Claflin and Company, now here announces to the court his election to be the prosecution of said cause No. 501, and asks leave of the court to withdraw his plea in reconvention in this cause, which is accordingly granted; and the said plea is now here withdrawn. It is therefore considered by the court that the said defendant, Samuel Kaiser, take nothing by his said plea, and that the said H. B. Claflin and Company go hence without day and recover of the defendant their costs on account of said plea expended.

29

30 *Motion to Strike Out, &c.*

SAM. KAISER
*vs.*
H. B. CLAFLIN *et al.* } No. 501.

Suit pending in the U. S. circuit court at Dallas.

Now comes the plaintiff in the above-entitled cause and moves the court to strike out the defendants' plea in abatement to the jurisdiction herein and his motion to quash, for the following reasons:

First. Because said pleas in abatement was not filed in one order of pleading, but was filed at the same time with a plea in bar and an answer to the merits, and def'ts have thereby waived ther right to plead in abatement.

Second. Because said defendants are estopped from and have further waived their right to plead in abatement, in this, that on the 29 day of Dec., 1883, said defendants filed their certain plea and motion in this cause, wherein and whereby they set up in bar of pl'ff's action herein that the said plaintiff had certain pleas of reconvention pending against said defendants in this hon. court, which said pleas set up the same matters set up in plaintiff's petition, and moved the court to require this plaintiff to elect whether or not he would prosecute this action or the said pleas in reconvention, and that this pl'ff be required to dismiss one or the other of said actions; whereupon issue was joined upon def'ts' said plea and motion, and trial had thereon; and this hon. court, by its certain interlocutory

judgment, rendered on the — day of January, 1884, in this cause, did order and adjudge that the facts stated in said plea were
31 true, and that def'ts' said motion be sustained, and did order this plaintiff to make his election as to which of said actions he would prosecute; and this plaintiff having elected to prosecute this action, he was required to by this hon. court and did dismiss and abandon his said pleas in reconvention, pending as aforesaid in this hon. court; all of which is manifest of record in this cause.

W. B. & G. G. WRIGHT &
BALL & McCART, *Pl'ff's Att'ys.*

(Endorsed:) No. 501. Sam. Kaiser *vs.* H. B. Claflin *et al.* Motion to strike out plea in abatement. Filed Jan'y 21, 1884. A. J. Houston, clerk.

*Order.*

From the Minutes, December Term, 1883.

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & CO. } No. 501.

MONDAY, *January* 28, 1884.

On this 28th day of January, 1884, came on to be heard the motion of plaintiff to strike out plea in abatement; said motion being considered by the court, it is adjudged that the same be sustained as to H. B. Claflin and Company and overruled as to the other defendants, L. Levenson and Company; to which ruling of the court the defendants, H. B. Claflin and Company, then and there excepted, and filed their bill of exceptions and asked to have the same be made a part of the record of this cause. It is further ordered that H. B. Claflin and Company and Samuel Kaiser have leave to amend.

(Written across in pencil:) #3, order on said motion, Vol. #3, page #408.

32 In U. S. Circuit Court, at Dallas.

SAM. KAISER
*vs.*
H. B. CLAFLIN *et al.* } No. —.

Be it remembered that on this day came on to be heard the plaintiff's motion to strike out the defendants' pleas in abatement of service and motion to quash writ & service in said cause, which motion to strike out is made part of this exception, & upon hearing thereof it was the opinion of the court that said pleas & motion had been waived by defendants', Claflin & Co.'s, motion to require the plaintiff to elect, which said motion is made part of this exception, and the court thereupon ordered that said plea be quashed & the said motion to quash service be stricken out as to said defendants, H. B. Claflin & Co., to which action of the court the defendants, H.

B. Claflin & Co., excepted in open court, & tendering this bill thereof the same is signed & allowed & sealed this Jan'y 28, 1884.

A. P. McCORMICK,
*U. S. Dist. Judge.*

(Endorsed:) No. 501. Sam. Kaiser *vs.* H. B. Claflin & Co. *et al.* Bill of exceptions of defendants, No. 1. Filed Jan'y 28, 1884. A. J. Houston, clerk, by H. P. Purnell, deputy.

In U. S. C't, at Dallas.

SAM. KAISER
*vs.*
H. B. CLAFLIN & Co. } No. 501.

And now comes H. B. Claflin & Co. and, subject to exceptions filed herein, amend their amended answer filed in this cause Feb. 13th, 1885, and thereupon plead—

1. That the petition is insufficient in law, and for special demurrer defendants say that the petition improperly joins as defendants parties not properly joined.

33 2. That said petition joins causes of action against several defendants that cannot be joined.

3. That the said petition does not separably aver facts showing any cause of action against these defendants.

4. The said petition does not show the separate damage done by these defendants, if any, nor furnish any basis for the estimate or measure thereof.

5. That said petition shows no cause for demanding exemplary damages or for the loss of credit or business character.

6. That said petition does not show what proportion of the goods levied upon were seized under plaintiff's writ of attachment nor that any goods were separately seized under said writ, nor which was first levied of the several writs alleged to have been issued in his petition.

SIMPKINS & SMITH,
CARTER, ROBERTSON & COKE,
*Att'ys for H. B. Claflin & Co.*

(Endorsed:) No. 501. Samuel Kaiser *vs.* H. B. Claflin & Co. Def'ts' 2nd amended original answer. Filed Feb. 13, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy. Carter & Wynne, Robertson & Coke, Simpkins & Smith, att'ys for def'ts.

These defendants deny all and singular the averments of plaintiff's petition, and for special answer these defendants say that before the levy of the writ of attachment complained of the merchandize levied upon under said writ had been seized, levied upon, and held by the marshall under a prior writ of attachment sued out against plaintiffs by Levenson & Co. from this hon. court; that said writ of attachment of Levison & Co. was foreclosed in this court and the proceeds of the said merchandize then in the hands of this court

by virtue of an order of sale previously issued from
34 this court was first applied to the payment of the judgment recovered by Levison & Co. against the plaintiff, in which said judgment these defendants had no interest; that immediately after the levy in favor of these defendants Clark Bros. caused a writ of atta. to be levied on said merchandize, and immediately thereafter various writs of attachment were levied upon said merchandize; that all of said writs were sued out upon valid demands, upon proper and true affidavits, and were levied on the merchandize of plaintiff then and there subject to said writs; that said merchandize did not exceed in value the amount of demands on which the said 1st three writs were issued; that the value of said merchandize did not exceed the amount of the 1st four writs issued, and that the proceeds of the merchandize sold as aforesaid was applied by the order of this court to the payment and satisfaction of the first four claims upon which writs of attachment issued as aforesaid; that these defendants caused the plaintiff no actual damage, nor did they sue out their writ of attachment maliciously or ratify any act of their agent, knowing of such malice, which they are ready to verify.

These defendants, further answering, say that the plaintiff was at the time of the issuing of these writs of attachment indebted to defendants in a large sum of money, to wit, $6,936.02, besides costs of
suit; that it was a subsisting valid indebtedness for which
35 these defendants recovered a judgment in this honorable court; with a foreclosure of their attachment lien, as appears of record; that so much of the proceeds of the merchandize as was used to satisfy said judgment was so used in the payment of a valid subsisting claim against the plaintiff; all of which they are ready to verify.

CARTER & ROBERTSON & COKE,
SIMPKINS & SMITH.

(Endorsed:) No. 501. Sam'l Kaiser *vs.* H. B. Claflin & Co. Def'n'ts' 2nd amended original answer. Filed Febr'y 13, 1886. A. J. Houston, clerk, by Jas. D. Adams, dep'ty. Carter & Wynne, Robertson & Coke, Simpkins & Smith, att'ys for def'n'ts.

SAM'L KAISER
*vs.* } No. —.
H. B. CLAFLIN & CO. *et al.*

Suit pending in the U. S. cir. c't at Dallas.

Now comes pl'ff in this cause and files this his 1st suppl. petition, and by way of reply to def'ts' 2nd amended original answer filed herein on the — day of Feb'y, 1886, says:

First. Pl'ff demurs to each and every plea in said amended answer contained, and says that each and every one of said pleas is wholly insufficient. He prays judgment upon each plea separately.

Second. He denies each and every allegation in said pleas contained, and of this he puts himself on the country.

(Endorsed:) No. 501. Sam. Kaiser *vs.* H. B. Claflin & Co. Pl'ff's 1st suppl. petition. Filed Feb'y 18, 1886. A. J. Houston, clerk, by Jas. D. Adams, dep'ty.

36 In U. S. Circuit Court, at Dallas.

SAM. KAISER *vs.* H. B. CLAFLIN & Co. } No. —.

(1.) Be it remembered that on the trial of the above cause the plaintiff Kaiser, being upon the stand as a witness for himself and having testified that his stock on July 1, 1882, was of the value, at cost, of 22,807 dollars, and that he bought in July & August, 1882, 51,747 dollars' worth of additional goods; having also testified that from July 1 to Nov. 17, 1882, the latter being the date of the levy of attachments upon his merchandize, he had sold at retail 12,000 dollars' worth of goods; that he had sold at wholesale to Sapowski Bros., whose credit in New York was not so good as Kaiser's, 33,000 dollars' worth of goods, at wholesale to Keersky 5,162 dollars' worth, to May at wholesale 1,207 dollars' worth; that on the day before his stock of merchandize was attached the said Sapowski Bros. owed him 13,815 dollars, plaintiff having drawn on him for large sums in favor of other creditors, & that said indebtedness was put in the shape of negotiable notes on the day said attachment was levied or on the next day, was then, on cross-examination by defendants' counsel, asked what he had done with said notes; to this question the plaintiff's counsel objected on the ground that what had transpired after said attachment was levied was immaterial & irrelevant; this objection was sustained by the court and the defendants excepted.

Be it further remembered that on the trial of said cause
37 the defendants introduced in evidence the testimony of Maddox, who testified that for several months prior to Nov. 17, 1882, he was the driver of an express wagon for the Texas Express Company at Ft. Worth, Texas; that plaintiff in October & up to Nov. 17, 1882, was shipping large quantities of goods by express to Sapowski Bros.; that said shipments were principally made at night from 8 to as late as 1 o'clock at night; that the shipments of said Kaiser during said period by express were larger than those of the wholesale merchants of Fort Worth, and that it was not usual for merchants to ship goods by express so late at night as said Kaiser did; that said shipments being unusual caused said witness, on one night when receiving express matter from the store of said Kaiser, to enquire of said Kaiser's clerk delivering same to witness why shipments were made at night, and defendants propose to prove by said witness that said clerk stated to witness in response to said enquiry that the purpose in view was secret & crooked. Counsel for the plaintiff objected on the ground that the testimony was hearsay, Kaiser not being present; the court sustained the objection, and defendants excepted.

(2.) Be it further remembered that on the trial of said cause, the plaintiff having introduced in evidence defendants' affidavit for attachment against plaintiff, the writ of attachment with the marshal's return thereon showing a levy upon merchandize aggregating in value 19,801 dollars, as valued by the marshal, under proper order of sale showing the sale of said merchandize for the sum
38 of 11,000 dollars, and the return into the registry of the court of the sum of 9,942.72 dollars, the marshal's costs in all the attachments levied at the same time having been deducted, the defendants proposed to prove that three other writs of attachment were placed in the hands of the marshal at the same time with defendants'; that said writs of attachment were levied by the marshal at the same time upon the same *upon the same* property; that said writs were numbered the defendants' No. 1 & the others, respectively, 2, 3, & 4, indicative of the order of lien & satisfaction under the Texas statute; that the said other suits, in which the said other writs of attachment were issued, were prosecuted to judgment by the plaintiffs therein against said Kaiser, plaintiff herein, and the net proceeds of the sale of said merchandize was applied to the satisfaction in full of defendants' judgment against said Kaiser and of the judgment in the case in which writ No. 2 was issued, and the remainder of said proceeds was paid to plaintiff in writ No. 3, upon their judgment against said Kaiser, the said proceeds not being sufficient to pay said last-named judgment in full & not being sufficient to pay anything upon the judgment of plaintiffs in writ No. 4; the said testimony was offered for the purpose of showing that the levy made by the marshal was not excessive; that there was not enough merchandize levied upon under the four writs to satisfy the same, and to limit defendants' liability to their proportion of the damage sustained by plaintiff by the levy & sale of said merchan-
39 dize. The proof aforesaid was objected to on the ground that defendants' writ having been levied upon the whole stock their liability for damages could not be limited in that way. The court permitted the proof to be introduced for the purpose of showing that the net proceeds of the attachment writs had been applied to the payment of the judgments against plaintiff, but for all other purposes sustained the objection aforesaid and excluded said proof as to such other purposes, stating that said four writs having been sued out at the same time by the same attorneys the defendants were responsible for the whole damage, not having had their writ levied upon a distinct portion of the stock less than the whole. To this ruling defendants excepted. The court also in the charge to the jury stated that if the defendants' attachment was wrongfully sued out the defendants were liable to plaintiff for the whole difference between the actual value of the merchandize levied upon and the net proceeds of sale thereof by the marshal; to which charge defendants also excepted.

3. Be it further remembered that on the trial of said cause, there being proof before the jury which tended to show an intent on the part of the plaintiff, at the date of the suing out & levy of the attachments complained of, to defraud his creditors by secreting his

property, putting it into the shape of notes & placing these beyond the reach of his creditors by fraudulently disposing of his property or otherwise, the defendants requested the court to charge the jury that the plaintiff was not entitled to recover if, when the at-
40 tachment complained of was sued out, he, said plaintiff, was about to convert his property or a part of it into money for the purpose of placing it beyond the reach of his creditors, or if he had already done this with a portion of the property, or if he was about to dispose of his property or part of it to defraud his creditors or had done it, or was about to secrete, &c., his property, or had done it to defraud his creditors. The court refused to give such charge, and defendants excepted; and the court instructed the jury that the ground for attachment stated in defendants' affidavit therefor was that said plaintiff was about to convert his property or a part of it into money for the purpose of placing it beyond the reach of his creditors; that if this particular ground did not in fact exist the attachment was wrongfully sued out; that the existence of other grounds for attachment was no justification; and to this charge the defendants excepted.

And the said biils of exception foregoing, numbered in brackets [1], [2], & [3], having been presented to the court, the same were approved, signed, sealed, & ordered to be filed & made part of the record in said cause January 30th, 1888.

A. P. McCORMICK, *Judge.*

(Endorsed:) No. 501. Sam. Kaiser *vs.* H. B. Claflin & Co. Bill of exception. Filed Feb'y 6th, 1888. A. J. Houston, clerk, by Jas. D. Adams, dep'ty.

[In pencil:] ≠ 18 show- date of entry, Vol. ≠ 3, page ≠ 510.

41 *From the Minutes, January Term,* 1888.

SAM. KAISER
*vs.*
H. B. CLAFLIN AND COMPANY and L. LEVENSON. } No. 501.

MONDAY, *January* 30, 1888.

Now, at this time, January 20, 1888, comes the plaintiff, Samuel Kaiser, and the defendant, H. B. Claflin and Company (the plea to the jurisdiction of the defendant, L. Levenson & Co., having been sustained at a former term of this court and said defendant having been then dismissed with its costs and being since that time no longer a party hereto), and, this case having been duly and regularly called for trial, the plaintiff announced that he is ready for trial, but the defendant, H. B. Claflin & Co., announced that it, the said defendant, is not ready for trial, and thereupon moved the court to grant it a continuance until next term upon its application therefor; whereupon the court, having heard the said defendant's said application and motion, is of the opinion that the same is insufficient, and overruled the same, and orders that the said cause pro-

ceed to trial, whereupon came the following jury of good and lawful men, to wit, G. W. Gillespie and eleven others, who, being duly empanneled and sworn, and after hearing the evidence and
42 argument of counsel and being duly charged and instructed by the court, retired to consider, and afterwards brought into open court the following verdict, to wit:

"We, the jury, find a verdict for the plaintiff in the sum of $20,057.23, principal, and interest at the rate of 8% per annum from 17th Nov'r, 1882, being $8,293.49, making a total of $28,350.72.

"(Signed) G. W. GILLESPIE, *Foreman.*"

Which said verdict is in all things approved by the court; and it is therefore considered and adjudged by the court that the plaintiff, Samuel Kaiser, do have and recover of and from the copartnership firm of H. B. Claflin & Co., composed as stated in pl'ff's original petition herein, defendants herein, the said sum of twenty-eight thousand three hundred and fifty & $\frac{72}{100}$ dollars ($28,350.72), with interest thereon at the rate of eight per cent. per annu n from this date until paid, and all costs herein incurred against said defendant-, for which let execution issue. It is further ordered that the officers of court have their execution against each of said parties for the costs incurred by them, respectively.

43 In U. S. Circuit Court, at Dallas.

SAM. KAISER
*vs.*
H. B. CLAFLIN & Co. } No. 501.

Be it remembered that, after verdict rendered in the above cause, the defendants, E. C. Eames, Jno. Claflin, H. I. Fairchild, Daniel S. Robinson, Dexter N. Force, & W. S. Dunn, objected to the judgment as entered in the record in said cause, because the said judgment does not name the members of the firm of H. B. Claflin & Co.; because the said suit was not dismissed at this term of court as to L. Levenson & Co., and there was no evidence in the record, in the files, or on the judge's docket of such dismissal at any previous term, and because the firm of H. B. Claflin & Co. had ceased to exist, H. B. Claflin, a member of said firm, having died pending said suit, to wit, on Nov. 14, 1885, of which fact defendants proposed to make proof, & the court refused to hear the same and ordered that said judgment stand as entered; to all which defendants excepted, and this bill of said exception is allowed, signed, & made part of the record, this Jan'y 30, 1888.

MEMORANDUM ADDED BY THE JUDGE.—The judge's docket showed that plaintiff's motion to strike out L. Levenson & Co.'s plea in abatement of the service had been overruled. There being no disputed fact presented by the plea, this action was equivalent to holding said plea good, and the case proceeded as though L. Levenson & Co. had been thereby dismissed, being so treated by all the counsel in the case.

A. P. McCORMICK, *Judge.*

44 (Endorsed:) No. 501. Sam. Kaiser *vs.* H. B. Claflin & Co. Bill of exceptions. Filed February 6, 1888. A. J. Houston, clerk, by Jas. D. Adams, dep'ty.

In U. S. Circuit Court, at Dallas.

SAM. KAISER
*vs.*
H. B. CLAFLIN & CO. } No. 501.

Be it remembered that on this 30 day of January, 1888, during the term at which judgment in the above cause was rendered, the motion of E. C. Eames *et al.* filed herein Jan'y 26, 1888, and the motion filed this day of the plaintiff to dismiss and strike out said motion came on to be heard, and the defendants, E. C. Eames & others, offered to prove the matters averred in their said motion, and, after hearing the argument of counsel, the court refused to hear proof of the matters averred in defendants' motion, and sustained the motion of said plaintiff to strike out said defendants' motion. Both said motions are hereto attached and made parts of this bill; and to the rulings of the court upon said motions the said defendants excepted in open court, and this bill of said exception is signed, allowed, & ordered to be filed as part of the record in said cause, this Jan'y 30, 1888.

A. P. McCORMICK, *Judge.*

SAMUEL KAISER *vs.* H. B. CLAFLIN & COMPANY.

Suit pending in the U. S. circuit court at Dallas.

45 Now comes plaintiff in the above-entitled cause and resists the motion of E. C. Eames and others, filed herein Jan'y 26th, 1888, praying that the verdict of the jury and the verdict of the court herein be set aside, and moves the court to dismiss said motion and hold the same for naught for the following reasons:

First. Because none of said movers are now or ever have been parties to this action, the said action having been brought and prosecuted against the copartnership firm of H. B. Claflin & Co., and no judgment or verdict having been rendered against said H. B. Claflin.

Second. Because it appears from the face of said motion and of the record that the said movers, as well as their attorneys, were advised of the death of said H. B. Claflin from the time of the happening thereof, and that plaintiff's said suit was being prosecuted herein, but they not only neglected and failed to suggest said death to the court for more than — years, but appeared in the defense of said action and of all of the defendants therein in the trial of the same and in the motion for a new trial; and now, after the verdict of the jury has been unfavorable to them and after the court has refused to grant them a new trial, for the first time they seek to avail themselves of the said death of H. B. Claflin.

Third. Because the said motion is evasive and insufficient, in this, that while it alleges that no will of the said H. B. Claflin has ever

been probated in the State of Texas it wholly fails to state
46 that the said H. B. Claflin died intestate, and to negative the proposition that he had not made a will, by the terms of which this suit might progress and be continued, notwithstanding his death, and after the same.

Fourth. Because this being a personal action for a tort of character, which did not and does not survive against said H. B. Claflin's individual estate or against his personal representatives, plaintiff here now discontinues said action against said H. B. Claflin if he ever was a party defendant thereto (which, however, plaintiff denies), and asks the court that said order of discontinuance be entered *nunc pro tunc*, as if made before the commencement of said trial.

Because said motion is on its face wholly insufficient and fails to show in the proper manner any sufficient reason for vacating said judgment or setting aside said verdict. And by way of answer to said motion plaintiff says:

1. He denies each and every allegation of fact in said motion contained which is not shown to be true by the record, and asks that said parties be held to strict proof thereof.

2. He avers that if said H. B. Claflin died as stated in said motion, the- all the parties thereto, as well as their attorneys, well knew and were fully advised of said fact at the time of the happening thereof, which occurred more than three years before the filing of said motion, and that for said term of more than two years they stood by and held their peace in this suit and allowed
47 the said action to proceed as it was originally commenced, and they and their said attorneys appeared or pretended to appear for said H. B. Claflin, from term to term of this court (if he was a party defendant, which plaintiff does not admit), and suffered and permitted two trial- of this cause to be had without any suggestion or objection, and permitted plaintiff, who was wholly ignorant of said death, to expend large sums of money besides much time and labor in preparing for trial and trying said cause, on said two occasions; wherefore plaintiff prays the judgment of the court as to whether said parties to said motion should be at this time heard to set up or complain of the matters set up in their said motion, and whether or not they are not estopped therefrom.

3. He avers that at and before the death of said H. B. Claflin he, the said Claflin, duly made and published his last will and testament, which said will was duly and legally probated in the city, county, and State of New York (where the said testator resided at the time of his death and where the principal part of his estate was situated), and by the terms of which said will the said copartnership firm of H. B. Claflin & Co., defendant- herein, was continued and kept in existence after his death, intact and unaltered by his said death, save and except that it might be dissolved after five years from the date of his said death, and by the terms of which
48 said will the plaintiff's said action was and is unaffected, and the status thereof unaltered by his said death; of all which said parties had full notice, and have at all times accepted and acted

under the provisions of said will and become bound by the provisions thereof; all of which plaintiff is ready to verify.

BALL & McCART,
*Plaintiff's Att'ys.*

(Endorsed:) No. 501. Sam. Kaiser *vs.* H. B. Claflin & Co. Reply to motion to set aside judg't. Filed Jan'y 30, 1888. A. J. Houston, clerk.

In U. S. Circuit Court, at Dallas.

SAM. KAISER
*vs.*
H. B. CLAFLIN AND CO. } No. —.

Now come E. C. Eames, H. I. Fairchild, Dexter N. Force, Daniel Robinson, William S. Dunn, and John Claflin, who were defendants in the foregoing cause, and also come Mrs. Agnes Claflin, John Claflin, and A. P. Claflin, sole heirs-at-law of H. B. Claflin, deceased, and respectfully show that said H. B. Claflin departed this life on the 14th day of Nov., 1885, leaving surviving him his widow, the said Mrs. Agnes Claflin, and only two children, the said John Claflin and A. P. Claflin, who constitute and are the sole heirs-at-law of said H. B. Claflin, deceased; that no will of said H. B. Claflin has ever been probated in Texas, nor has administration in Texas ever been opened upon the estate of said H. B. Claflin, deceased; that the fact that the said H. B. Claflin had died was published at the time
49 throughout the United States, and his death was and is a matter of general knowledge and of public history; that in the above cause the death of said H. B. Claflin was never suggested, and after his death the said cause, in which he was a defendant, proceeded against him as the same had proceeded before; that the verdict and judgment rendered thereon at this term of this honorable court were rendered against the said H. B. Claflin, as well as the other defendants in said suit; that neither the heirs nor legal representatives of said Claflin, deceased, were made parties to said suit; that the verdict and judgment rendered in said suit were entire and were erroneous, the said H. B. Claflin having died before the said verdict and judgment were rendered and before the commencement of the trial resulting in said verdict and judgment.

Wherefore the parties aforesaid moving herein pray for notice of the filing and contents of this motion to be served upon said Sam. Kaiser, who resides in Tarrant county, Texas; that the court will hear proof of the facts averred herein, and that the erroneous verdict and judgment aforesaid may be reversed and set aside, &c., &c.

SMITH, CARTER, D., R. & C.,
*For Actors in Above Motion.*

UNITED STATES OF AMERICA, } *ss:*
*Northern District of Texas,* }

Before me, the undersigned commissioner, this day personally came L. Mandelbaum, who, being duly sworn, doth depose
50 that he is an agent for H. B. Claflin & Co. in the above-enti-

tled cause of Sam. Kaiser *vs.* H. B. Claflin & Co.; that he is acquainted with the contents of the foregoing motions, and that the averments thereof, that H. B. Claflin died on the 14th day of November, 1885, and that he left surviving him his widow and the two children named in said motion, are true.

L. MANDELBAUM.

Subscribed and sworn to before me this January 26th, 1888.

[SEAL.] JAS. BENTLEY,
*Commissioner Circuit Court of the United States for the Northern District of Texas.*

(Endorsed:) No. 501. Sam. Kaiser *vs.* H. B. Claflin & Co. Motion to set aside verdict & judgment. Motion docket #31, pg. #75. Filed Jan'y 26, 1888. A. J. Houston, clerk, by Jas. D. Adams, deputy.

(Written across the face in pencil:) #21. Order on above bill of ex., Vol. #3, page #511.

51 *Order.*

From the Minutes, January Term, 1888.

SAMUEL KAISER
*vs.*
H. B. CLAFLIN & Co. } No. 501.

MONDAY, *January* 30, 1888.

Now at this time comes on to be heard the motion of E. C. Eames *et al.* (filed Jan'y 26, 1888) to set aside verdict and judgment herein, as well as the demurrer and motion to dismiss said motion made by plaintiff; and the court, having heard the argument of counsel upon said two motions, is of opinion that the law is for the plaintiff thereon, and that the said motion of plaintiff to dismiss be sustained, and that said motion of Eames and others is insufficient and should be dismissed and for naught held; which is hereby done accordingly; to which ruling of the court said Eames and others except.

52 *Petition for Writ of Error.*

To the honorable justices of the Supreme Court of the United States:

Now come E. C. Eames, H. I. Fairchild, Dexter N. Force, William S. Dunn, Daniel Robinson, surviving copartners of the firm of H. B. Claflin & Co., a firm formerly composed of H. B. Claflin, E. C. Eames, H. I. Fairchild, Dexter N. Force, William S. Dunn, and John Claflin, by their attorneys, and complains that in the record and proceedings and also in the judgment in a suit between Samuel Kaiser, plaintiff, and the said firm of H. B. Claflin & Co., defendants, tried in the United States circuit court, northern district of Texas, at Dallas, Texas, at the January term, A. D. 1888, and in which judgment was rendered against said firm on, to wit, the 20th day of

January, A. D. 1888, manifest error hath intervened, to the great damage of said firm of H. B. Claflin & Co., as well as to your petitioners. Petitioners show that H. B. Claflin, one of the members of said firm, hath departed this life on, to wit, the 14th day of November, A. D. 1885; wherefore they, as surviving copartners of said firm, pray for the allowance of a writ of error in their own names and on their own behalf, as well as for and on behalf of said firm of H. B. Claflin & Co., and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

ROBERTSON & COKE,
SIMPKINS & SMITH,
CRAWFORD & CRAWFORD,
A. M. CARTER,
*Att'ys for Pl'ffs in Error.*

Allowed Jan'y 30, 1888.

A. P. McCORMICK, *Judge.*

53 (Endorsed:) No. —. E. C. Eames *et al.* pl'ffs in error, *vs.* Sam. Kaiser, def't in error. Petition for writ of error. Filed Jan'y 30, 1888. A. J. Houston, clerk, by Jas. D. Adams, dep'ty c.

In the Supreme Court of the United States.

E. C. EAMES & Others, Plaintiffs *of* Error,

*versus*

SAM. KAISER, Defendant in Error.

Know all men by these presents that we, E. C. Eames, Dexter N. Force, Daniel Robinson, W. S. Dunn, H. I. Fairchild, and John Claflin, as principals, and B. Blankenship and S. D. Blake, as sureties, are held & firmly bound unto Sam. Kaiser in the sum of forty thousand dollars, to be paid to him, his executors or administrators; to which payment, well & truly to be made, we bind ourselves & each of us, jointly & severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals & dated this January 30, 1888.

Whereas the said E. C. Eames, Dexter N. Force, Daniel Robinson, W. S. Dunn, H. I. Fairchild, & John Claflin, surviving members of the firm of H. B. Claflin & Co., have presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the suit of Sam. Kaiser *vs.* H. B. Claflin & Co. in the circuit court of the United States for the northern district of Texas, at Dallas, on January 20, 1888, in which the said Sam. Kaiser recovered a judgment against the said H. B. Claflin & Co.,

54 "composed as stated in plaintiff's petition," for the sum of twenty-eight thousand three hundred & fifty & $\frac{72}{100}$ dollars, together with all costs of suit: Now, therefore, the condition of this obligation is such that if the above-named E. C. Eames, John Claflin, W. S. Dunn, H. I. Fairchild, Dexter N. Force, & Daniel Robinson, surviving partners as aforesaid, shall prosecute their said

writ of error to effect and answer all damages & costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be & remain in full force & virtue.

(Signed) E. C. EAMES, [L. S.]
" DEXTER N. FORCE, [L. S.]
" DANIEL ROBINSON, [L. S.]
" H. I. FAIRCHILD, [L. S.]
" W. S. DUNN, [L. S.]
" JOHN CLAFLIN, [L. S.]
By L. MANDELBAUM. [L. S.]
" B. BLANKENSHIP. [L. S.]
" S. D. BLAKE. [L. S.]

B. Blankenship and S. D. Blake, being duly sworn, say upon oath that they are worth the sum of forty thousand dollars above all homestead exemptions & liabilities.

This 30th day of Ja'y, 1888.

[SEAL.] E. H. ROBERTSON,
*Notary Public, Dallas Co., T'x.*

The above & foregoing writ of error supersedeas bond, is hereby approved & ordered filed as good & sufficient, & the clerk will issue the writ of error required.

A. P. McCORMICK,
*U. S. Dist. Judge.*

55 (Endorsed:) No. —. E. C. Eames *et al. vs.* Sam'l Kaiser. Writ of error bond. Filed Jan'y 30, 1888. A. J. Houston, clerk, by Jas. D. Adams, deputy.

56 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Samuel Kaiser, plaintiff, and H. B. Claflin & Co., a firm formerly composed of H. B. Claflin, E. C. Eames, Dexter N. Force, H. I. Fairchild, Daniel Robinson, William S. Dunn, & John Claflin, a manifest error hath happened, to the great damage of the said firm of H. B. Claflin & Co., as by the complaint of E. C. Eames, Dexter N. Force, H. I. Fairchild, Daniel Robinson, William S. Dunn, & John Claflin, surviving copartners of said firm, is made to appear, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid as well as the said firm, in this behalf, do command you
57 that if the judgment be therein given that under your seal, distinctly and openly, you send the record and proceedings

aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon'l. Morrison R. Waite, Chief Justice of the said Supreme Court, the 30th day of January, A. D. 1888, and the seal of said circuit court, at Dallas, in the 112th year of the Independence of the United States.

[The Seal of the U. S. Circuit Court, Northern Dist. of Texas, Dallas.]

A. J. HOUSTON,
*Clerk of the United States Circuit Court,*
*North. Dist. of Texas, at Dallas,*
By JAS. D. ADAMS, *Deputy.*

Allowed by—
A. P. McCORMICK, *U. S. Dist. Judge.*

[Endorsed:] No. 31. No. 24. Circuit court. E. C. Eames *et al.* *vs.* Sam. Kaiser. Writ of error. I hereby certify that a copy of this writ of error was lodged with me this day by pl'ffs in error for service upon defendant in error this Jan'y 30, 1888. A. J. Houston, clerk, by Jas. D. Adams, deputy.

58 UNITED STATES OF AMERICA, *ss:*

To Samuel Kaiser, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for fifth judicial circuit and northern district of Texas, at Dallas, wherein E. C. Eames *et al.* are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. P. McCormick, United States district judge for the northern district of Texas, holding circuit court at Dallas, within said district, this 1st day of February, A. D. 1888.

A. P. McCORMICK,
*United States District Judge, Northern Dist. of Texas.*

59 On this the first day of February, A. D. 1887, personally appeared before me the subscriber, W. L. Cabell, United States marshal for the northern district of Texas, and makes oath that he delivered a true copy of the above citation to Samuel Kaiser, at Dallas, Texas, on the first day of February, A. D. 1888.

W. S. CABELL,
*U. S. Marshal.*

Sworn to and subscribed before me this the 1st day of February, A. D. 1888.

A. J. HOUSTON,
*Clerk U. S. Cir. Court, Dallas, Texas,*
By JAS. D. ADAMS,
*Deputy Clerk.*

[Endorsed:] No. 30. No. 25. E. C. Eames *et al.*, pl'ffs in error, *vs.* Samuel Kaiser, defendant. Citation to Supreme Court.

[In pencil:] Cert'd copy, 2, 1, '88. 2, 1, '88.

60 I, A. J. Houston, clerk of the United States circuit court for the northern district of Texas, at Dallas, do hereby certify that the foregoing contains a true and correct transcript of the petition, citation & return, plea to the jurisdiction, original answer, petition for removal, bond for removal, motion to remove, order removing cause, motion to make election, orders on election, motion to strike out plea in abatement, order on motion to strike out plea in abatement, bill of exceptions, defendants' 2d amended answer, plaintiff's 1st supplemental petition, bill of exceptions, judgment, bills of exceptions, order on bill of exceptions, petition for writ of error, bond for writ of error, and the originals of the writ of error and citation in error, in case No. 501, styled Samuel Kaiser *vs.* H. B. Claflin and Company, as appears from the records of said court.

Witness the seal of said court and the name of the clerk thereof, at Dallas, Texas, this 18th day of July, A. D. 1888, and of American Independence the 113th year.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON, *Clerk.*

Endorsed on cover: N. Texas C. C. U. S. No. 1141. E. C. Eames, Dexter N. Force, H. I. Fairchild, Daniel Robinson, William S. Dunn, and John Claflin, surviving partners of the firm of H. B. Claflin & Co., plaintiffs in error, *vs.* Samuel Kaiser. Filed September 27, 1888.

FILED
NOV 2 1891
JAMES H. McKENNEY

# In the Supreme Court of the United States.

OCTOBER TERM, 1891.

E. C. EAMES, DEXTER N. FORCE, H. I. FAIRCHILD, DANL. ROBINSON, W. S. DUNN, and JOHN CLAFLIN, Surviving Partners of the firm of H. B. CLAFLIN & CO., *Plaintiffs in Error*,

No. vs.

SAMUEL KAISER, *Defendant in Error.*

SAWNIE ROBERTSON,
M. L. CRAWFORD,
Counsel for Plaintiffs in Error.

John F. Worley, Stationer and Printer, Dallas, Texas.

Sworn to and subscribed before me this the 1st day of February, A. D. 1888.

A. J. HOUSTON,
*Clerk U. S. Cir. Court, Dallas, Texas,*
By JAS. D. ADAMS,
*Deputy Clerk.*

[Endorsed:] No. 30. No. 25. E. C. Eames *et al.*, pl'ffs in error, *vs.* Samuel Kaiser, defendant. Citation to Supreme Court.

[In pencil:] Cert'd copy, 2, 1, '88. 2, 1, '88.

60 I, A. J. Houston, clerk of the United States circuit court for the northern district of Texas, at Dallas, do hereby certify that the foregoing contains a true and correct transcript of the petition, citation & return, plea to the jurisdiction, original answer, petition for removal, bond for removal, motion to remove, order removing cause, motion to make election, orders on election, motion to strike out plea in abatement, order on motion to strike out plea in abatement, bill of exceptions, defendants' 2d amended answer, plaintiff's 1st supplemental petition, bill of exceptions, judgment, bills of exceptions, order on bill of exceptions, petition for writ of error, bond for writ of error, and the originals of the writ of error and citation in error, in case No. 501, styled Samuel Kaiser *vs.* H. B. Claflin and Company, as appears from the records of said court.

Witness the seal of said court and the name of the clerk thereof, at Dallas, Texas, this 18th day of July, A. D. 1888, and of American Independence the 113th year.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON, *Clerk.*

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# In the Supreme Court of the United States.

OCTOBER TERM, 1891.

E. C. EAMES, DEXTER N. FORCE, H. I. FAIRCHILD, DANL. ROBINSON, W. S. DUNN, and JOHN CLAFLIN, Surviving Partners of the firm of H. B. CLAFLIN & CO., *Plaintiffs in Error*,

No. vs.

SAMUEL KAISER, *Defendant in Error.*

SAWNIE ROBERTSON,
M. L. CRAWFORD,
Counsel for Plaintiffs in Error.

John F. Worley, Stationer and Printer, Dallas, Texas.

# In the Supreme Court of the United States.

E. C. EAMES et al., Plaintiffs in Error,

vs.

SAMUEL KAISER, Defendant in Error.

## Brief for Plaintiffs in Error.

This suit was originally commenced in the District Court of Tarrant County, Texas, by defendant in error against plaintiffs in error and H. B. Claflin and L. Levison & Co.

The action was for damages for the wrongful issue and levy of two writs of attachment, both against defendant in error, one in favor of H. B. Claflin & Co., a partnership alleged to be composed of plaintiffs in error, and H. B. Claflin, and the other sued out by L. Levison & Co., whose individual names are stated in the petition. The petition was filed June 22nd, 1883. (Printed Transcript, pp. 1-6). It was alleged that the defendants resided in the State of New York, and service was effected upon H. B. Claflin & Co., under Arts. 1230, 1234 of the Revised Civil Statutes of Texas. (pp. 6, 7, 8).

On September 20th, 1883, defendants appeared by counsel and excepted to the jurisdiction of the court as

obtained by such service, and also moved to quash the process. (p. 8).

Subject to these pleadings, the defendant on the same day filed general and special demurrers and a general denial. (p. 9).

Also on the same day the defendant field petition and bond for the removal of the suit to the Circuit Court, (pp. 11, 12). On September 21st, 1883, an order removing the case was made. (p. 13).

The original attachment suits of Claflin & Co. and L. Levison & Co. were yet pending in the Circuit Court at Dallas, and in the Claflin case defendant in error had pleaded his damages in reconvention; and, when the damage suit from Tarrant county came to the same court, plaintiffs in error moved the court to require Kaiser to elect which suit for damages he would prosecute. (P. 13.) This motion was granted January 9th, 1884. (P. 14.) On January 11th, Kaiser elected to prosecute his independent suit for damages. (P. 15.)

On January 21st, 1884, Kaiser, defendant in error, moved the court to strike out the plea of Claflin & Co. and Levison & Co. to the jurisdiction. The motion, on January 28th, was granted as to Claflin & Co. and overruled as to Levison & Co., the court holding that the motion of Claflin & Co. to require Kaiser to elect had effected an appearance for that firm. (P. 16.) A bill of exception was saved to that ruling, (p. 19,) but no assignment of error is based upon it, because it is believed that the decision of this court in York vs. State makes any appearance in the State court a good appearance for the next term.

On February 13th, 1886, plaintiffs in error filed an amended answer, consisting of demurrers, general denial, and special answer in substance that the merchandise levied upon was subject to the writs of attachment; that it was first seized under the Levison & Co. writ, second by the Claflin & Co. writ, third by writ issued at the suit of Clark Bros., followed immediately by various other writs; that all the writs were sued out upon valid demands and on true affidavits, and that the merchandise levied upon did not exceed in value the demands of Levison & Co., Claflin & Co. and Clark Bros. and the first writ following the latter; that the goods were sold, pending the attachment suits, under interlocutory order, and the proceeds applied to the first four writs aforesaid; that Claflin Co.'s claim against Kaiser amounted to $6936.02, was valid, and that as much of Kaiser's merchandise as was appropriated to the payment of that demand was lawfully and properly so appropriated. (p. 18.)

Defendants in error excepted to this answer and denied its averments by a supplemental petition filed February 18, 1886. (p. 18.)

On the trial of the case, the defendant in error, Kaiser, was a witness for himself. He testified that his stock of merchandise on July 1, 1882, was of the value, at cost, of $22,807; that he bought in July and August, 1882, $51,747 worth of additional goods. He also testified that from July 1 to November 17, 1882 (the latter being the date of the levy of attachments upon his merchandise), he had sold at retail $12,000 worth of goods; at wholesale to Sapowaski Bros., whose credit in New York

was not so good as Kaiser's, $33,000 worth of goods; to Keersky, at wholesale, $5,162 worth, and to May, at wholesale, $1,207 worth. He further testified that, on the day before the attachments were levied, Sapowaski Bros. owed him $13,815, which, on the day the attachments were levied or the day after, was put in the shape of negotiable notes. Plaintiffs in error then asked the witness what he had done with said notes. To this question his counsel objected, on the ground that what had transpired after the attachments were levied was immaterial and irrelevant. The court sustained this objection, and the point was saved by plaintiffs in error by bill of exceptions number one (p. 19.) It was also proved upon the trial that in October and November—up to November 17—Kaiser shipped a great many goods from Fort Worth, where he carried on his business, by express. These shipments were made from 8 to 1 o'clock at night. They were unusual, because larger than shipments made by wholesale merchants and were also unusual because of the time at which they were made. Maddox, a driver of one of the express company's wagons, was a witness. He stated that his curiosity was excited by the unusual character of the shipments made by Kaiser, and on one occasion asked Kaiser's clerk, delivering goods to witness, why the shipments were made at night, and the plaintiffs in error proposed to prove by the witness that the clerk stated, in response to that inquiry, that the purpose in view was secret and crooked. Counsel for defendant in error objected to this testimony on the ground that it was hearsay, and the court sustained the objection, and the point was saved by plaintiffs in error (p. 19.)

On the trial of the case, on behalf of the defendant in error, the affidavit on which the attachment was issued in the case of Claflin & Co. against Kaiser, was introduced; also writ of attachment and the return of the marshal thereon, showing sale of the merchandise levied upon for the sum of $11,000 and the return into the registry of court of the sum of $9,942.72—the marshal's costs in all the attachments levied at the same time having been deducted. The plaintiffs in error then proposed to prove that three other writs of attachment were placed in the hands of the marshal at the same time with that issued in the Claflin & Co. case; that said writs of attachment were levied by the marshal at the same time upon the same property; that said writs were numbered, the Claflin & Co. writ No. 1, and the others numbered respectively 2, 3, and 4, indicative of the order of lien and satisfaction under the Texas statute; that the said other suits in which the said other writs of attachment were issued were prosecuted to judgment by the plaintiffs therein against said Kaiser, and the net proceeds of the sale of said merchandise was applied to the satisfaction in full of the Claflin & Co judgment against Kaiser, and the judgment in which writ No. 2 was issued, and the remainder of the proceeds was paid to the plaintiff in writ No. 3, upon their judgment against said Kaiser—the said proceeds not being sufficient to pay anything upon the judgment of plaintiffs in writ No. 4. The said testimony was offered for the purpose of showing that the levy made by the marshal was not excessive; that there was not enough merchandise levied upon under the four writs to satisfy the four claims and to limit

the liability of plaintiffs in error to their proportion of the damage sustained by plaintiff by the levy and sale of said merchandise. The proof aforesaid was objected to on the ground that the writ of Claflin & Co. having been levied upon the whole stock, their liability for damages could not be limited in that way. The court permitted the proof to be introduced for the purpose of showing that the net proceeds of the attachment writs had been applied to the payment of the judgments against plaintiff, but, for all other purposes, sustained the objection aforesaid and excluded said proof as to such other purposes—stating that, said four writs having been sued out at the same time by the same attorneys, the plaintiffs in error were responsible for the whole damage, not having had their writ levied upon a distinct portion of the stock less than the whole. The plaintiffs in error saved the point by bill, and the court charged the jury that, if the Claflin attachment was wrongfully sued out, the plaintiffs in error were liable to Kaiser for the whole difference between the actual value of the merchandise levied upon and the net proceeds of the sale thereof by the marshal, and to this charge plaintiffs in error also excepted and saved the point by bill. (p. 20.)

On the trial of the case, there was proof before the jury which tended to show an intent on the part of Kaiser, at the date of the suing out and levying of the attachments on his merchandise, to defraud his creditors by secreting his property, putting it into the shape of notes, and placing these beyond the reach of his creditors, by fraudulently disposing of his property, or otherwise, and

the plaintiffs in error requested the court to charge the jury that Kaiser was not entitled to recover damages if when the attachment complained of was sued out, he was about to convert his property, or a part of it, into money for the purpose of placing it beyond the reach of his creditors; or if he had already done this with a portion of his property, or if he was about to dispose of his property or a part of it to defraud his creditors, or had done so, or was about to secrete his property, or had done so, to defraud his creditors. The court refused to give such charge and plaintiffs in error excepted, and the court instructed the jury that the ground for attachment stated in the affidavit therefor was, that said Kaiser was about to convert his property, or a part of it, into money; that, if this particular ground did not in fact exist, the attachment was wrongfully sued out; that the existence of other grounds of attachment was no justification: and to this charge the plaintiffs in error excepted and saved the point by bill.

The result of the trial was a verdict for the defendant in error for the sum of $28,350.72, which was rendered January 20th, 1888. (p. 22). After the verdict was rendered, but before any judgment was entered upon the verdict, defendant in error, on January 26th, 1888, filed a motion, supported by affidavit, showing that H. B. Claflin, one of the members of the firm of H. B. Claflin & Co., had died on November 14th, 1885—subsequent to the commencement of the suit and prior to the trial of the case—and praying the court to arrest and set side the judgment on that ground. Defendant in error, on January 30th, filed a motion to strike out the

said motion of plaintiffs in error, and the said motion of defendant in error was granted on the same day that it was filed; and to that action of the court the plaintiffs in error excepted and saved the point by bill. (p. 23.) [*Note.*—The two motions are copied in the transcript as parts of the bill of exceptions, and follow the bill on pages 23, 24 and 25.] On January 30th, a judgment on the verdict was entered against "H. B. Claflin & Co., composed as stated in plaintiff's original petition herein." The judgment also recited that the plea to the jurisdiction of L. Levison & Co. "having been sustained at the former term of this court, and said defendant having been then dismissed with its costs and being since that time no longer a party hereto," etc. To the judgment as entered as aforesaid, the plaintiffs in error objected on the ground that the names of the members of the firm of H. B. Claflin & Co. should be stated in the judgment, and on the further ground that there was no evidence in the record, in the files, or on the judge's docket, of any dismissal of the suit as to Levison & Co. They also objected to the said entry of judgment, because the firm of H. B. Claflin & Co. had ceased to exist, a member of said firm having died pending the suit, of which fact the plaintiffs in error proposed to make proof. The court refused to hear said proof and ordered that said judgment stand as entered, and the plaintiffs in error excepted and saved the point by bill. (Tr., p. 22.)

To correct the judgment and the several errors in the record, this writ of error was prosecuted by the surviving members of the firm of H. B. Claflin & Co.

The errors assigned and specified for which a re-

versal of the judgment below is sought, are as follows:

1. The court below erred in refusing to allow the defendant in error, when a witness on the stand under cross-examination by plaintiffs in error, to state, in answer to a question propounded to him by plaintiffs in error, what he had done with the $13,815.00 of negotiable notes received on the day that the attachments were levied, or the day thereafter, as shown by the first paragraph in the bill of exception number one. (Record, p. 19).

2. The court below erred in refusing to allow the plaintiffs in error to prove upon the trial, as a limit to the liability of plaintiffs in error in this suit, that three other writs of attachment were levied by the same officer at the same time upon the same property with the levy made in the case of Claflin & Co. against Kaiser; that in the three other cases, as in the Claflin & Co. case, the suits were prosecuted to judgment, and the proceeds of the goods, as far as they would reach, were applied in their order to the satisfaction of said judgments, according to the numbers of writs, under the statutes of the State of Texas; and in charging the jury that the plaintiffs in error were liable for the whole damage because the writ of Claflin & Co. was sued out by the same attorney who sued out the three other writs, as shown by bill of exception number two. (Record, p. 2).

3. The court erred in not rendering judgment against L. Levinson & Co., as well as H. B. Claflin & Co., upon the verdict rendered—L. Levinson & Co. not having been dismissed from the case in any way, and the ver-

dict of the jury being a general one in favor of the plaintiff below.

4. The court erred in refusing to grant the motion of plaintiffs in error to set aside the judgment on the ground that H. B. Claflin, who had been a party to the suit, had died pending the suit, and in striking out said motion upon the motion of defendant in error; as shown by bill of exception contained in the printed record at pages 23, 24 and 25.

The errors here complained of will be considered in the order in which they have been stated.

I.

The affidavit, on which the attachment issued, averred that Kaiser was "about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors" (p. 3.) If this averrment was true, there could be no liability for damages, the writ would not be wrongfully sued out. What Kaiser was *about* to do can be known or proved only by circumstances; among these circumstances the most potential in evidence would be what he immediately did do.

On the day the attachment issued, or the day after, he had $13,815.00 in negotiable notes. He was asked on cross-examination what he did with them, and the court sustained an objection to the question, on the ground that what transpired after the attachment was immaterial and irrelevant. The objection was premature, because it did not appear that he had disposed of the notes *after* the attachment.

But, assuming that he did not dispose of them before

the attachment, was the objection properly sustained?

The witness was the adverse party, and hence we could not state what his answer would be.

But, if he had answered that he converted them into cash immediately or shortly after the affidavit was made, the jury might have concluded, in accordance with or over any explanation he might have given, that the intent to make that conversion was in his mind when the affidavit for attachment was made. The affidavit affirmed two propositions:

First, the intent to convert his property into money; and,

Second, the purpose of placing the money beyond the reach of creditors.

If Kaiser had been permitted to answer the question, and he had answered as above supposed, a circumstance would have been proved from which the jury might have found that the first proposition in the affidavit was true.

On the other hand, the witness might have answered the question by stating that he still held the notes, or that he kept them until long after the attachment. These answers would have been immaterial and irrelevant testimony. But the court could not know what the answer would be—it was assumed that any answer would be irrevelant and immaterial.

Kaiser was the adverse party—a witness for himself—was being cross examined; and it is submitted that he should have been permitted and required to answer the question ruled out by the Court below.

There was other testimony tending to prove the

second proposition in the affidavit. (See third bill of exception, p. 20.)

II.

On the trial below, plaintiffs in error offered to prove that four writs of attachments were placed in the hands of the marshal at the same time, one being the Claflin & Co. writ, which under the statute was numbered 1, and the three others were numbered respectively 2, 3 and 4; that the four writs were levied at the same time on the same merchandise; that these suits were prosecuted to judgment; and that the net proceeds of the sale of the merchandise were applied to the satisfaction of these judgments in the order in which the writs were numbered—the fourth receiving nothing. This proof was offered to confine the liability of plaintiffs in error to the damages done by them, or to their proportion of the damages. The proof was objected to on the ground that, as the Claflin & Co. writ was levied on the whole stock of merchandise, the liability could not be limited in this way. The court admitted the proof for the purpose of showing that all the net proceeds of the merchandise were used in paying judgments against Kaiser, but excluded it for all other purposes—the court stating "that said four writs having been sued out at the same time by the same attorneys, the defendants, (Claflin & Co.) were responsible for the whole damage, not having had their writ levied upon a distinct portion of the stock less than the whole." The Court also charged the jury that if the Claflin & Co. attachment was wrongfully sued out, they were liable for the whole difference between the value of the mer-

chandise and the net proceeds of sale of the same by the marshal.

The statutes referred to are as follows:

"Art. 167. The writ of attachment shall be levied in the same manner as is or may be the writ of execution upon similar property."

"Art. 2283. The officer receiving an execution shall indorse thereon the exact hour and day when he received it, and, if he received more than one on the same day against the same person, he shall number them as received." * * * * *Revised Civil Statutes of Texas.*

All four of the writs were issued at the same time, received by the officer at the same time, and levied at the same time upon the same property.

The writ happening to be numbered one was first entitled to satisfaction; this was the only difference.

It was the duty of the officer to take enough property to satisfy the writs and costs at forced sale.—*Murphree on Sheriffs, Sec.* 526.

The net proceeds of sale were not sufficient to satisfy the judgments recovered in the four cases in which the writs issued. There was, therefore, no excessive levy.

If each writ had been levied upon distinct portions of the stock, all the stock would have been levied upon, because all was less than enough to satisfy all the writs. Claflin & Co. would not then have been liable for all the damage.

Why should their liability be increased by the fact that the officer levies each writ upon all the goods? The

damage to Kaiser is the same. Why is his remedy not the same?

A reason suggests itself upon the surface. The Claflin writ was levied upon all the goods. Claflin was, therefore, responsible for all the damage.

We submit that this reason is superficial.

(1.) It ignores the other writs. If the Claflin writ had been the only one levied, the levy would have been excessive and improper. But, if not excessive, it would, if the writ was wrongfully sued out, have been the cause of all the damage. But there were other writs. Without the other writs, all the goods would not have been levied upon. With the other writs, it was proper to levy upon all the goods. In levying several writs against the same defendant, it is usual—almost universal—and not improper, for the officer to levy each writ upon all the property, unless there is more than sufficient to cover all the writs. The proceeds are then distributed—first, to the payment in full of writ No. 1, second, to the payment in full of writ No. 2, and so on. If the writs are wrongfully issued, there is no more difficulty in apportioning the damage done by each, than if the levies were upon distinct portions of the property; if the goods are worth $30,000.00 and they sell for $10,000.00; if then there are three writs, one for $5,000.00, and two each for $2,500.00, it is plain that one-half the goods was sacrificed to pay the first writ, and one-fourth was sacrificed to pay each of the other two. To hold Claflin & Co. liable for the whole damage, charges them not only with the difference between the value of the goods sold to pay their debt and what they sold for net, but also with the

difference between the value of the goods sold to pay the other judgments and what they sold for net.

For this extended liability, two reasons are assigned by the court below:

(1.) That all the writs were sued out at the same time by the same counsel; and,

(2.) That the Claflin writ, (and each of the others,) was levied on the whole stock.

That the plaintiffs in the several writs employed one attorney, and that he instituted all the suits at the same time, can not make them responsible for each other's acts. If a wrong was done it did not consist in the employment of counsel or in filing the suits at the same time. If a trespass had been committed, these acts might have been considered to show the several plaintiffs were joint trespassers—*Eddy vs. Howard, 23 Iowa, 175*—but of this phase of the case more will be said further on.

If there is aught to make Claflin & Co. liable for the whole damages, it is to be found in the second reason—that their writ was levied on the whole stock.

It is to be remembered that the suit is not for trespass: it is *ex contractu*. Whatever its form the bond required by statute and given by Claflin & Co. as the basis of the writ of attachment, is the foundation of the suit. If the bond were not required, there would be no cause of action. "It is in the nature of an action on a covenant (whether the suit is brought directly on the bond or not) for the recovery of actual damages—legal compensation for the legal injury." *Harris vs. Finberg, 46 Texas*, 79-97.

The plaintiff in attachment contracts with the defendant to pay him such damages as the writ may cause him, if it is wrongfully issued.

Art. 156. "Before the issuance of any writ of attachment the plaintiff must execute a bond, with two or more good and sufficient sureties, payable to the defendant, in a sum not less than double the debt sworn to be due, conditioned that the plaintiff will prosecute his suit to effect and will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment." *Revised Civil Statutes of Texas.*

Each of the plaintiffs in the four writs made such a contract—separately, not together; each is liable for the damage done by his writ.

It is not alleged or proved that the other writs were wrongfully sued out. If not wrongfully sued out, some of the goods levied upon were rightfully appropriated to pay the demands of the plaintiffs in the writs. It is true that Claflin & Co. get the benefit of the net proceeds of the sale of the goods applied to these. But the net proceeds amount to less than one-third the value of the goods as estimated by the jury. The net proceeds of sale amounted to $9942.00. Claflin & Co's. debt amounted to $6936.00. $3,000.00 were appropriated to the other writs, satisfying No. 2 and paying part upon No. 3. But the verdict of the jury shows that they estimated the value of the goods at $30,000.00. From this sum they deducted the net proceeds of sale, and the verdict is for the balance, to which they add interest from the date of the levy. The $3000.00 applied to the other writs, therefore, represents more than $9000.00 worth of goods. These

$9000.00 worth of goods were appropriated to the payment of other demands against Kaiser under other writs of attachment, which may not have been wrongfully issued.

At the sale the goods brought $11,000.00. The net proceeds was ascertained by deducting the marshal's costs in all the cases in which he made simultaneous levies. The judgment rendered makes Claflin & Co. pay all these costs, although in the other three cases the plaintiffs prosecuted their suits to judgment, recovering costs against Kaiser. The record does not show that they recovered costs, but, under the statute, costs are awarded to the successful party. "Art. 1421. The successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except where it is or may be otherwise provided by law." *Revised Civil Statutes of Texas.*

On what theory are Claflin & Co. made to refund to Kaiser the costs recovered from him by other attaching creditors? The goods appropriated to the payment of these costs, as valued by the jury, amounted to more than $3,000.00. Claflin & Co. not only get no credit for $3,000.00, but get none for the $1,057.00 used in paying the costs of the four suits.

The plaintiffs proposed to prove that the levies were all made at the *same time*; they were levied, not to satisfy Claflin's writ, but to satisfy the four writs.

No trespass was committed. Valid writs were levied upon property subject to them. The liability arises from the contracts made by the plaintiffs in the writs to

pay the damages, if the writs were wrongfully sued out. The writs are not illegal—they are issued, not upon the existence of a given state of facts, but upon an affidavit that certain facts exist. If the facts do not exist, the writ is lawful process, but wrongfully sued out. The writ is not even abated by proof that the facts do not exist. *Cloud vs. Smith, 1 Texas, 611; Dwyer vs. Testard, 65 Texas, 432.* All of the writs being valid and levied upon property subject to them, no trespass was committed, there was no joint tort—no liability on one plaintiff for damages done by the process of another wrongfully sued out—but each plaintiff is liable for the difference between the value of the goods taken to satisfy his debt and the price realized at forced sale of the goods so taken.

There was no joint trespass committed by the plaintiffs in the four writs and no joint contract made by them; there was, therefore, no joint liability, either *ex delicto* or *ex contractu*. The officer incurred no liability; he lawfully executed valid process. It is submitted that there could only be a several liability for the damages respectively done by the several plaintiffs.

This case is to be distinguished from *Stone vs. Dickinson*, (5 Allen, 29,) and other cases in which the writs are "irregular and void" and afford no protection. In the one case, there is a trespass; in the other there is none. In the one case, the liability is *ex delicto*, and is joint and several; in the other, the liability is *ex contractu*, and, there being no joint contract, the liability is several only. There can be no recovery for the one

damage from each plaintiff in the several writs; but from each plaintiff may be recovered the damage done by his writ.

III.

As alleged in the original petition, the suit is instituted against H. B. Claflin & Co., a firm composed of H. B. Claflin, E. C. Eames, H. I. Fairchild, Dexter N. Force, Daniel Robinson, William S. Dunn and John Claflin; and L. Levison & Co., another firm composed of L. Levison, Michael Levison and Max Levison. (R. 1.)

The citation was directed to H. B. Claflin & Co. and L. Levison & Co., firms composed as above stated, and was served in New York by delivering to John Claflin, one of the firm of H. B. Claflin & Co., and Michael Levinson, one of the firm of L. Levinson & Co., copies of the notice and petition. (R., 6-7.)

This attempted service of process beyond the limits of the State of Texas was a nullity and did not give to the District Court of Tarrant county jurisdiction over the persons of the defendants. Afterwards the defendants filed a plea to the jurisdiction as follows:

Now comes H. B. Claflin, E. C. Eames, H. I. Fairchild, Dexter N. Ford, Daniel Robinson, W. S. Dunn and John Claflin, composing the firm of H. B. Claflin & Co., and L. Levinson, Michael Levinson and Max Levinson, composing the firm of L. Levinson & Co., and say that they are the defendants in the above entitled cause, and that each of said defendants were at the date of the institution of the suit, citizens of the State of New York, etc. (R. 8.)

This voluntary appearance on the part of the defendants and not the citation served in New York, gave the court jurisdiction over their persons. The Levisons were then parties to the record as defendants. After the case was removed into the Circuit Court the plaintiff filed a motion to strike out the plea to the jurisdiction, (R., 15-16,) which was sustained as to H. B. Claflin & Co. and overruled as to Levison & Co., (R. 16), but no order was ever made dismissing the suit as to the Levisons. The judge's note to the bill of exceptions states that overruling the motion to the plea to the jurisdiction as to the Levinsons was equivalent to holding the plea good, and that the case proceeded as though Levison & Co. had been dismissed and was so treated by all the counsel. No action was ever taken in the case as to the Levisons except to overrule the motion to strike out their plea to the jurisdiction. And we submit that the overruling of this motion left the plea upon the grounds stated therein undisposed of, and the court should have overruled the plea upon the trial. The verdict is a general verdict in favor of the plaintiff and of course against all the defendants, and the judgment should have followed the verdict and should have been entered against all the defendants. It matters not how many defendants there may be, there can be no final judgment against one until the case is finally disposed of as to all.

Wooters vs. Kauffman, 67 Texas, 497.

The judgment must be supported by the verdict and the admissions contained in the pleadings.

Handell vs. Elliott, 60 Texas, 147.

Benett vs. Butterworth, 11 How., 675.

The verdict in this case was returned into court on January 20th, and the judgment was entered on the 30th. (R., 21,22.)

On January 26th the present plaintiffs in error, together with Mrs. Agnes Claflin, John Claflin and A.P.Claflin, sole heirs at law of H. B. Claflin, filed their motion supported by affidavit to set aside and vacate the verdict and judgment upon the ground that one of the defendants, H. B. Claflin, died on November 14th, 1885. That his death had never been suggested; that no will had been probated in this state, and no administration opened on his estate, and that the judgment was rendered against him. They prayed that notice of the motion be served upon Kaiser and that the court hear proof of the facts averred. (R., 25.) To this motion plaintiff filed exceptions. (R., 23-24.) The matter was heard on January 30th. Eames and others offered to prove the matters averred in the motion, but the court refused to hear the proof, and sustained the exceptions to the motion. (R., 23.) Art. 1224, Rev. Stat. of Texas, is as follows: "In suits against partners the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served." The names of the individual members of the firm are set out in the original petition, and, as has already been said, the service of citation upon John Claflin in New York (R. 7) was a nullity. The individual members of the firm of H. B. Claflin & Co. appeared and plead to the jurisdiction of the court and

moved to quash the service. By this voluntary action on their part all the defendants submitted to the jurisdiction. The recital in the judgment is that "Samuel Kaiser do have and recover of and from the co-partnership firm of H. B. Claflin & Co., composed as stated in plaintiff's original petition herein, defendants herein, the sum of, etc." (R. 22.) This is a judgment against each individual member of the firm, and is as much a judgment against H. B. Claflin as it is against John Claflin. The name of the firm may be given instead of the names of its individual members where the names of the members are stated in the petition.

Freeman on Judg., Sec. 50 *a*.

In Smith vs. Chenault the caption of the judgment was A. T. Chenault & Co., vs. Smith & Young.

The parties are afterwards called plaintiffs and defendants. This was held to be a judgment against the individual members of the firm.

48 Texas, 456.

Hays vs. Yarborough, 21 Texas, 488.

If the judgment was against the firm of H. B. Claflin & Co. and not against the individual members of the firm it should have directed that execution be levied upon partnership property only. Art. 1346, Rev. Stat. of Texas is as follows: "Where suit is against several partners jointly indebted upon contract and the citation has been served upon some of such partners, but not upon all, judgment may be rendered therein against such partnership and against the partners actually served, but no personal judgment or execution shall be awarded against those not served." In Alexander vs. Stern, 41

Tex., 193, execution was directed against the partner served and against the firm property. That the judgment in this case would support an execution against any constituent of the firm of H. B. Claflin & Co. is clear. (48 Tex., 488.)

H.B.Claflin having died after the institution of the suit, but before the trial, the judgment as to him is voidable and should have been set aside upon motion. In Texas it is well settled that a judgment rendered against a dead man is voidable.

Hooper vs. Caruthers, 78 Texas, 436-437.

Denni vs. Elliott, 60 Texas, 339.

Giddings vs. Steele, 28 Texas, 755.

Mills vs. Alexander, 21 Texas, 162.

In March, 1884, Edward F. Dunne sued H. B. Claflin & Co. in the Superior Court of Cook county, Illinois. On May 13th, 1884, defendants and each of them answered. January, 1887, judgment was rendered against each of the defendants. In May, 1888, John Claflin as executor of H. B. Claflin, together with the other defendants, filed a motion to vacate the judgment upon the ground that H. B. Claflin was dead at the time the judgment was rendered. It was proved by affidavit and otherwise that H. B. Claflin died November 14th, 1885. The court overruled the motion, and upon appeal this ruling was reversed and a new trial awarded.

Claflin et al. vs. Dunne, 129 Ill., 242.

Where judgment has been rendered against a dead man, relief may be had by a motion in the court in which it was rendered to set aside the judgment. This is the established practice in Texas and elsewhere.

McClelland vs. Moore, 48 Texas, 361.

Pickett vs. Legerwood, 7 Peters, 148.

The judgment either binds the firm only, or it binds the firm and the individuals.

If the latter view is claimed, then the judgment should have been set aside, as already shown.

If the former view is claimed—that is, that the judgment is only against the firm—then we submit two propositions:

First, the death of H. B. Claflin dissolved the firm; and

Second, that a judgment against a firm or anything which has ceased to be is, if not void, erroneous and reversible.

That the death of one of the members dissolves an ordinary partnership is elementary.

*Lindley on Partnership, Vol. 2, Mar. p. 590.*

The survivors may sue and be sued in respect to firm credits or firm liabilities.

But as the firm no longer exists no regular judgment can be rendered for or against it.

Indeed, a judgment for or against a firm in the firm name, not naming the constituents, is irregular even while the partnership continues.

A firm is not like a corporation, made an artificial person. The Statutes of Texas authorize a judgment against a firm in but one instance—Article 1224 Revised Civil Statutes of Texas. Under this statute no execution can issue except against the partnership and members served. Art. 1346.

But these statutes refer to existing partnerships.

Certainly the law as to dissolved corporations would apply with at least equal force to dissolved partnerships.

A judgment against a corporation cannot even be revived after its dissolution.

Mumma vs. Potomac Co., 8 Peters, 281.

Every suit by or against it abates upon dissolution. There is perhaps no principle of the law of corporations so thoroughly and so unanimously established.

Bank vs. Colby, 21 Wall., 609.

2 Waterman on Cor., Sec. 434.

Taylor on Cor., Sec. 435.

2 Marowitz, Sec. 1031.

Life Assen. of Am. vs. Goode, 71 Texas, 90.

If only the firm of Claflin & Co. was before the court, there was no defendant after the dissolution of the firm by the death of H. B. Claflin. The judgment particularizes the firm against which it is rendered. It is not the new firm, which under the same name may have been the successor of the old, but it is the firm composed and described in the petition, the firm of which H. B. Claflin had been a member, and which it was proposed to prove had ceased to be by the death of H. B. Claflin.

It may be replied that a firm, on the principles stated, could always escape a judgment by voluntary dissolution. So may any defendant. Suicide, dissolution, a ceasing to be prevents judgment, for a judgment may not be lawfully rendered against nothing.

*Lindley on Partnership, Vol. 1, Mar. 288.*

It has been held in numerous cases in Texas that upon service of citation on one member of a firm after

dissolution, a judgment may be rendered subjecting to its payment firm property.

*Alexander vs. Stern, 41 Tex., 193.*

*Sanger vs. Overmier, 64 Tex., 57.*

But it has never been held that a judgment may in turn be rendered against a firm after the firm has ceased to be.

The judgment is an entirety as to all the parties against whom it is rendered. It cannot be reversed and remanded as to some of the parties and affirmed as to others.

Robinson vs. Schmidt, 48 Texas, 19.

Acklin vs. Paschal, 48 Texas, 178.

Claflin vs. Dunne, 129 Ill., 248.

Richards vs. Walton, 12 John., 434.

Hanley vs. Donoghue, 59 Md., 239.

Same case, 43 Am. Rep., 554.

We respectfully ask that the judgment be reversed and the cause remanded.

SAWNIE ROBERTSON,
M. L. CRAWFORD,
Of Counsel for Plaintiffs in Error.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1891.

E. C. EAMES and others, *Plaintiffs in Error*,
*vs.*
SAMUEL KAISER.
No. 125.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

## BRIEF FOR DEFENDANT IN ERROR.

The defendant in error sued the plaintiffs in error and others in the proper State court in Texas for wrongfully and maliciously, without any just and legal cause, attaching his property and thereby injuring and damaging him in various ways to the amount of $100,000. The case being, on motion of defendant below, removed to the United States Circuit Court for the Northern District of Texas was there, after much pleading and several rulings of the court, tried upon the merits, and Kaiser obtained a verdict, and judgment was rendered thereon for $28,350.72 at 8 per cent. interest and costs, etc. (Rec., 1–6 and 22.)

Plaintiffs in error presented and had signed several

bills of exceptions during the progress of the case and on the final trial, and prosecuted the writ of error herein, but there is no assignment of errors accompanying the record.

Pending the case in the State court, defendants below filed a plea to the jurisdiction; a motion to quash the service of citation and process; a general demurrer to the complaint, also a special demurrer; and an answer denying each and all the allegations of the complaint; and at the same time, September 26, 1883, they petitioned for a removal of the cause from the State court, etc., and the case was removed. (Rec., 8–13.)

On the 29th December, 1883, Claflin & Co. filed a motion in the United States Circuit Court, to which the case was removed, to compel Kaiser to elect between his plea in reconvention to the suit by them against him, and this (his suit against C. & Co.), and the court sustained this motion and Kaiser elected to prosecute this suit. (Rec., 13–15.)

On the 21st January, 1884, Kaiser moved to strike out the plea in abatement and the motion to quash the service filed by C. & Co., and the court sustained the motion and C. & Co. excepted. (Rec., 15–17.) This is the first exception disclosed by the record, and it may as well be argued in its order. The causes assigned for striking out the plea in abatement and the motion to quash are these:

First. Said plea in abatement was not filed in one order of pleading, but was filed at the same time with a plea in bar and an answer to the merits, and def'ts have thereby waived their right to plead in abatement.

Second. Said defendants are estopped from and have further waived their right to plead in abatement, in this, that on the 29 day of Dec., 1883, said defendants filed their certain plea and motion in this cause, wherein and whereby they set up in bar of pl'ff's action herein that the said plaintiff had certain pleas of reconvention pend-

ing against said defendants in this hon. court, which said pleas set up the same matters set up in plaintiff's petition, and moved the court to require this plaintiff to elect whether or not he would prosecute this action or the said pleas in reconvention, and that this pl'ff be required to dismiss one or the other of said actions; whereupon issue was joined upon def'ts' said plea and motion, and trial had thereon; and this hon. court, by its certain interlocutory judgment, rendered on the — day of January, 1884, in this cause, did order and adjudge that the facts stated in said plea were true, and that def'ts' said motion be sustained, and did order this plaintiff to make his election as to which of said actions he would prosecute; and this plaintiff having elected to prosecute this action, he was required to by this hon. court and did dismiss and abandon his said pleas in reconvention, pending as aforesaid in this hon. court; all of which is manifest of record in this cause.

The propositions contained in the motion to strike out are self-evident—they argue themselves. To sustain the first ground, if authorities be needed, see—

Prince *v.* Equitable Life, etc., 145 Mass., 56;
Railway Co. *v.* Whitby, 77 Tex., 126;
Campbell *v.* Wilson, 6 *Ib.*, 391;
Shepard *v.* Graves, 14 How., 505;
Kauffman *v.* Wootters, 138 U. S., 285;
York *v.* Texas, 137 U. S., 15; S. C., 73 Tex., 651.

The very motion to quash the service waived the plea in abatement.

Feibleman *v.* Edwards, 69 Tex., 334.

The second ground of the motion is as well supported by authority as the first. When C. & Co. said it was important for K. to elect whether he would stand on his plea to another suit or prosecute this suit for the same purpose, they abandoned all questions as to jurisdiction and of service, and said, in effect, they were in court to

bills of exceptions during the progress of the case and on the final trial, and prosecuted the writ of error herein, but there is no assignment of errors accompanying the record.

Pending the case in the State court, defendants below filed a plea to the jurisdiction; a motion to quash the service of citation and process; a general demurrer to the complaint, also a special demurrer; and an answer denying each and all the allegations of the complaint; and at the same time, September 26, 1883, they petitioned for a removal of the cause from the State court, etc., and the case was removed. (Rec., 8–13.)

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First. Said plea in abatement was not filed in one order of pleading, but was filed at the same time with a plea in bar and an answer to the merits, and def'ts have thereby waived their right to plead in abatement.

Second. Said defendants are estopped from and have further waived their right to plead in abatement, in this, that on the 29 day of Dec., 1883, said defendants filed their certain plea and motion in this cause, wherein and whereby they set up in bar of pl'ff's action herein that the said plaintiff had certain pleas of reconvention pend-

ing against said defendants in this hon. court, which said pleas set up the same matters set up in plaintiff's petition, and moved the court to require this plaintiff to elect whether or not he would prosecute this action or the said pleas in reconvention, and that this pl'ff be required to dismiss one or the other of said actions; whereupon issue was joined upon def'ts' said plea and motion, and trial had thereon; and this hon. court, by its certain interlocutory judgment, rendered on the — day of January, 1884, in this cause, did order and adjudge that the facts stated in said plea were true, and that def'ts' said motion be sustained, and did order this plaintiff to make his election as to which of said actions he would prosecute; and this plaintiff having elected to prosecute this action, he was required to by this hon. court and did dismiss and abandon his said pleas in reconvention, pending as aforesaid in this hon. court; all of which is manifest of record in this cause.

The propositions contained in the motion to strike out are self-evident—they argue themselves. To sustain the first ground, if authorities be needed, see—

Prince *v.* Equitable Life, etc., 145 Mass., 56;
Railway Co. *v.* Whitby, 77 Tex., 126;
Campbell *v.* Wilson, 6 *Ib.*, 391;
Shepard *v.* Graves, 14 How., 505;
Kauffman *v.* Wootters, 138 U. S., 285;
York *v.* Texas, 137 U. S., 15; S. C., 73 Tex., 651.

The very motion to quash the service waived the plea in abatement.

Feibleman *v.* Edwards, 69 Tex., 334.

The second ground of the motion is as well supported by authority as the first. When C. & Co. said it was important for K. to elect whether he would stand on his plea to another suit or prosecute this suit for the same purpose, they abandoned all questions as to jurisdiction and of service, and said, in effect, they were in court to

meet K. on the merits, whether presented on a plea of reconvention or in another suit by K.

Friezen *v.* Allemania, etc., 30 Fed. R., 349;
Habich *v.* Folger, 20 Wall., 1;
Creighton *v.* Kerr, *Ib.*, 8–14;
Lampley *v.* Beavers, 25 Ala., 534
Abbott *v.* Wilbur, 22 La. An., 268
Renaud *v.* Abbott, 116 U. S., 277;

and see as to waiver in pleading, generally—

Wilson *v* Fowler, 3 Ark., 463;
Duncan *v.* Ripley, 7 *Ib.*, 100;
Carroll *v.* Crawford Co., 11 *Ib.*, 623;
5 Rob. Pr., 6–17;
*Ib.*, 101–3.

Taking the case, by removal, to the United States Circuit Court, was a waiver also, and brought the plaintiffs in that court on the merits.

Barney *v.* Globe Bank, etc., 5 Blatch., 107;
Pollard *v.* Dwight, 4 Cr., 421;
Gracie *v.* Palmer, 8 Wheat., 699;
Toland *v.* Sprague, 12 Pet., 330;
Maxwell *v.* Stewart, 22 Wall., 77;
*Ex parte* Schollenberger, 96 U. S., 369.
Ward *v.* Todd, 113 U. S., 327;
Page *v.* City, etc., 6. Fed. R., 599–602.

These parties, C. & Co., not only actually appeared in the case, but seemed anxious and eager for, and courted the contest on, the merits; in fact, by this record they exhibited "hot haste" to get to a trial, and a trial they had.

They amend further their pleadings by special demurrer, and by special answer on the facts (Rec., 17–18).

Kaiser then amended his pleadings by filing a demurrer to the amended answer of C. & Co. and a replication denying each and every allegation thereof (Rec., 18).

But these several points preliminary to the trial, it appears now, are not before this court, as plaintiffs in error in their brief do not urge them, or make any point on them, but seem to admit they were in the court below properly and allege errors occurring on and after the trial.

On the trial Kaiser, as a witness, testified touching the fact that a firm owing him over $13,000, which was put in the shape of negotiable notes on the day or the day after the attachment was levied on his goods, and on cross-examination he was asked what he had done with those notes, which question, on objection by K.'s counsel, was ruled out by the court as *immaterial and irrelevant*, and C. & Co. excepted to this ruling (Rec., 19). It was incumbent upon the party offering this to show what effect was expected to be produced by it—what was to be influenced or accomplished by it, and this was not attempted.

Railroad Co. *v.* Smith, 21 Wall., 257–61;
G. C. & S. F. Ry. *v.* Locker, 78 Tex., 284;
Beeman *v.* Jester, 62 *Ib.*, 431.

But plainly, what occurred after the suit was begun and the attachment levied was immaterial, as it is an elementary principle that the right of C. & Co. to the attachment must have been complete when it was sued out, and if not then complete, nothing afterwards occurring could cure it and make it complete so as to uphold that suit; the cause of action must have arisen before the commencement of the suit.

Lowrey *v.* Lawrence, 1 Cai., R., 69;
Cheetham *v.* Lewis, 3 J. R., 42;
Moore *v.* Maple, 25 Ill., 341;
Wadley *v.* Jones, 55 Geo., 329;
Dr. Att., § 9, (7 ed.);
Cool. Torts (2d ed.), 211, n. 3.

Another exception saved by C. & Co. (Rec., 19) is to the ruling of the court in refusing to receive the declarations of K.'s clerk, *made in his, K.'s, absence*, why certain shipments of goods were made by K.—that is, K.'s purpose in making them. It would be exceedingly difficult to find anything more *hearsay* than this. It was not proposed even to show what K. should have said, but goes beyond this and tries to prove what K.'s purposes and motives were by what a clerk of K.'s said or did in his absence. It is hardly possible to argue this. But this is already determined in so many words in Texas (Schrimpf *v.* McArdle, 13 Tex., 368).

The next exception for C. & Co. appears on page 20, record, and is presented in full as follows:

Be it further remembered that on the trial of said cause, the plaintiff having introduced in evidence defendants' affidavit for attachment against plaintiff, the writ of attachment with the marshal's return thereon showing a levy upon merchandize aggregating in value 19,891 dollars, as valued by the marshal, under proper order of sale showing the sale of said merchandise for the sum of 11,000 dollars, and the return into the registry of the court of the sum of 9,942.72 dollars, the marshal's costs in all the attachments levied at the same time having been deducted, the defendants proposed to prove that three other writs of attachment were placed in the hands of the marshal at the same time with defendants'; that said writs of attachment were levied by the marshal at the same time upon the same *upon the same* property; that said writs were numbered the defendants No. 1 & the others, respectively, 2, 3, & 4, indicative of the order of lien & satisfaction under the Texas statute; that the said other suits, in which the said other writs of attachment were issued, were prosecuted to judgment by the plaintiffs therein against said Kaiser, plaintiff herein, and the net proceeds of the sale of said merchandize was applied to the satisfaction in full of defendants' judgment against said Kaiser and of the judgment in the case in which writ No. 2 was issued, and the remainder of said proceeds was paid to plaintiff in writ No. 3, upon their judgment against said Kaiser, the said proceeds not being sufficient to pay said last-named judgment in full & not

being sufficient to pay anything upon the judgment of plaintiffs in writ No. 4; the said testimony was offered for the purpose of showing that the levy made by the marshal was not excessive; that there was not enough merchandize levied upon under the four writs to satisfy the same, and to limit defendants' liability to their proportion of the damage sustained by plaintiff by the levy & sale of said merchandize. The proof aforesaid was objected to on the ground that defendants' writ having been levied upon the whole stock their liability for damages could not be limited in that way. The court permitted the proof to be introduced for the purpose of showing that the net proceeds of the attachment writs had been applied to the payment of the judgments against plaintiff, but for all other purposes sustained the objection aforesaid and excluded said proof as to such other purposes, stating that said four writs having been sued out at the same time by the same attorneys the defendants were responsible for the whole damage, not having had their writ levied upon a distinct portion of the stock less than the whole. To this ruling defendants excepted. The court also in the charge to the jury stated that if the defendants' attachment was wrongfully sued out the defendants were liable to plaintiff for the whole difference between the actual value of the merchandize levied upon and the net proceeds of sale thereof by the marshal; to which charge defendants also excepted.

If error was committed in this ruling it was against K., and not against C. & Co., for it is clear, upon authority, the evidence offered by C. & Co. in this connection was not competent for any purpose. The defendants' writ was numbered "1" by the marshal, whereby it was levied on and was a first lien on all the property described in the return, and the mere fact that other writs were thereafter, or even at the same time, levied on the same property was not an excuse nor a justification, and it was not competent before the jury even in mitigation.

1 Wade, Att., § 322;
Dr. Att., § 724, *et seq.* (7 ed.);
Thomas *v.* Chapman, 62 Tex., 193;
Sayer's Tex. Civ. Stat., Arts. 167, 2283;
Torrey & Co. *v.* Schneider, 74 Tex., 120–1.

However pleasing and interesting may be a disquisition on the nature of Kaiser's claim in this suit, whether it arises out of trespass or contract, it is practically of no moment or advantage, as the plain fact stands before the court that the writ of Claflin & Co. was levied on all the goods, and they therefore, under the authorities, are liable commensurately with that levy; that is, for all the damage, and it matters not in this inquiry how much or how little other attaching parties may be liable for. The argument of plaintiffs' counsel on this point might be quite applicable if this were a suit on the attachment bond, but this happens to be not such a suit, but a suit for wrongful and malicious attachment which is an action of tort beyond all doubt.

3 Bl. Com. (Cool., 3d ed.), 126, n. 9;
Cool. Torts, 217–18;
14 Am. & Eng. Enc. Law, 37.

The next exception reserved by plaintiffs in error is to the effect that the court would not charge the jury—that the plaintiff (Kaiser) was not entitled to recover if, when the attachment complained of was sued out, he (K.) was about to convert his property or a part of it into money, for the purpose of placing it beyond the reach of his creditors, or if he had already done this with a portion of the property, etc. But instead of that the court charged that as the ground of attachment sworn to was, that K. was about to convert his property or a part of it into money, for the purpose of placing it beyond the reach of his creditors, if this particular ground did not exist, the attachment was wrongfully sued out and the existence of other grounds for attachment was no justification, and to this charge plaintiffs in error excepted.

This charge of the court is almost a literal statement of the law as found in the authorities. The whole contest arises on the cause for attachment as sworn to, and not on other and different causes, and not on other and different things supposed to have been done by Kaiser,

and if that cause upon which the attachment was sworn out did not exist, it was wrongfully issued, and the parties suing it out are liable.

Wolcott *v.* Hendrick, 6 Tex., 405;
Dennenbaum *v.* Schram, 59 Tex., 281;
Bear & Bro. *v.* Marx, 63 Tex., 298;
Blum *v.* Strong, 71 Tex., 321;
Kennedy *v.* Meacham, 18 Fed. R., 312.

And in cases of this kind it is not permitted to prove other similar acts of the party plaintiff than those upon which the original suit or prosecution was based, by way of justification to defeat his claim for damages, and what was asserted here by C. & Co. was in justification to defeat K.'s recovery absolutely; this could not be done.

1 Greenl. Ev. (14 ed.), secs. 52, 448;
Hanmer *v.* Wilsey, 17 Wend., 91;
Otis *v.* Jones, 21 *Ib.*, 374;
Lyon *v.* Yates, 52 Barb. (N. Y.), 237;
Carson *v.* Edgeworth, 43 Mich., 241.

This finishes the exceptions noted in the record up to and inclusive of the trial, and in examining them with the whole record, the court can not fail to see that no injustice has been done plaintiffs in error.

To a good complaint (petition) C. & Co. appeared in law and in fact, as we have seen, and tried upon the facts of the case. There is not a single substantial averment wanting in the complaint (Dr. Att., § 724 *et seq.*) and the issues went fairly to the jury and they found for K., not an exorbitant or extravagant sum at all; no vindictive or punitive damages, but his actual damage occasioned by his losses (see his testimony, Rec., 19). There can be no pretext in law for interfering with the judgment.

After the verdict was returned into court and judgment entered on it, plaintiffs in error moved to set it aside, because the suit was not dismissed as to Levenson & Co., and because H. B. Claflin, one of the firm of C. &

Co., had died pending the suit, but the court overruled this motion and plaintiffs in error excepted (Rec., 22).

A memorandum on the bill of exceptions as to this point (Rec., 22), signed by Judge McCormick, shows that Levenson & Co. had disappeared from the record on their plea, and both parties had, in truth, recognized this fact during the progress of the case. At best, the point was immaterial, as no damage was done plaintiffs in this respect.

There is just as little in the objection based on H. B. Claflin's death as there is in the matter of Levenson & Co.'s dismissal from the suit. The ruling of the court on that is correct. The suit had to proceed just as it did, and if any mere irregularity was committed it can be corrected in the court below, but it is no matter for reversal here.

Troy Iron and Nail Co. *v.* Winslow, 11 Blatch., 513;
King *v.* Bell, 13 Neb., 409;
Hammond *v.* St. John, 4 Yerger, 107;
Townes *v.* Brickett, 12 Leigh, 173;
Gaines *v.* Bierne, 3 Ala., 114;
Gilbraith *v.* Jones, 66 *Ib.*, 129;
Dunman *v.* Coleman, 59 Tex., 199;
Sayer's Tex. Civ. Stat., *sup.*, 1250–57.

This court does not reverse for mere irregularities in the technical mode of proceeding, where no harm is thereby done to the party complaining.

Allis *v.* Insurance Co., 97 U. S., 144;
Goddard *v.* Ordway, 101 *Ib.*, 745.

Upon the entire record, it must appear to the court, this is a very proper case in which to illustrate the force of the twenty-third rule as to *delay* cases, and it is respectfully asked that rule be applied.

Respectfully,

A. H. GARLAND,
H. J. MAY,
*For Defendant.*

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[No. 125.]

EAMES AND OTHERS *vs.* KAISER.

Memorandum of authorities referred to in answer to Mr. Justice Brown, on the argument by defendant's counsel, on the point as to the result of the attachment suit, but on which no question was made by plaintiffs in error:

That the case of malicious prosecution must be finally disposed of relates, in fact, to criminal prosecutions, and not civil suits.

Bigel. Torts, 73;
Arundel *v.* White, 14 East., 216.

The rule announced in *Stewart* v. *Sonneborn, 98 U. S., 195*, that the proceeding must have *failed* is too broad as a general proposition, while it may have done for that case specially.

"The reasonable rule seems to be that the technical prerequisite is only the particular prosecution be disposed of in such manner that the prosecutor, if he proceeds further, will be put to a new one." (*Cool. Torts, 216–17.*) But, it has been held, it is not necessary to show termination of attachment suits. (*Cool., Ib., 218–19; Fortman* v. *Bottier, 8 Ohio (U. S.), 548; Tomlinson* v. *Warren, 9 Ib., 104; Newark* v. *Upson, 40 Ib., (St.) 17; Bumps* v. *Betts, 19 Wend., 421; Dr. Att, § 729.* And whatever there is in this, the matter is cured by verdict anyhow, as these authorities show.

But in Texas as the truth of the affidavit in attachment suits can not be controverted, and the party at-